IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-1258

STATE OF MINNESOTA,

Petitioner

v.

FIRST OF OMAHA SERVICE CORP.

No. 77-1265

MARQUETTE NATIONAL BANK OF MINNEAPOLIS

Petitioner

v.

FIRST OF OMAHA SERVICE CORP.

ON WRITS OF CERTIORARI TO THE
MINNESOTA SUPREME COURT

PETITIONS FOR WRITS OF CERTIORARI FILED MARCH 13, 1978 CERTIORARI GRANTED MAY 22, 1978

APPENDIX

(Attorneys names appear on inside front cover)

224-7631 — Review Publishing Co., 287 E. 6th St., St. Paul, Minn. 55101 — 224-7631

APPENDIX INDEX

PAGE

PAGE

APPENDIX

In The

Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-1258

STATE OF MINNESOTA,

Petitioner

v.

FIRST OF OMAHA SERVICE CORP.

No. 77-1265

MARQUETTE NATIONAL BANK OF MINNEAPOLIS

Petitioner

v.

FIRST OF OMAHA SERVICE CORP.

ON WRITS OF CERTIORARI TO THE
MINNESOTA SUPREME COURT

PETITIONS FOR WRITS OF CERTIORARI
FILED MARCH 13, 1978
CERTIORARI GRANTED MAY 22, 1978

RELEVANT DOCKET ENTRIES

6-3-76	Demand For Change of Venue as of right.
	Affidavit of James W. Brehl.
	Affidavit of Bernard J. Duffy.

6-11-76	Motion and Petition for Removal from County District Court.
	Bond for Removal.
	Notice of Filing Petition for Removal.
6-14-76	Summons and Complaint.
	Plaintiff's first set of interrogatories to defendant.
	Plaintiff's dismissal without prejudice against First National Bank of Omaha.
6-16-76	Notice and Motion of defendant to dismiss or for more definite statement returnable 7-13-76 at 9:00 a.m.
6-17-76	Letter opposing change of venue filed.
6-18-76	Notice and Motion of plaintiff to remand the matter to County District Court.
6-21-76	Notice and Motion of First National Bank of Omaha.
6-23-76	Separate Answer and Crossclaim of Credit Bureau returnable 7-16-76 at 9:00 a.m.
	Notice and Motion of Credit Bureau for Dismissal returnable 7-16-76 at 9:00 a.m.
6-30-76	Notice and Motion of Credit Bureau to set aside plaintiff's dismissal of First National Bank of Omaha; if the motion for dismissal is not granted, returnable 7-16-76 at 9:00 a.m.
7-1-76	Affidavit of James L. Doody.
7-2-76	Notice and Motion of First National Bank of Omaha to dismiss complaint returnable 7-16-76 at 9:00 a.m.
7-7-76	Objections of defendant to plaintiff's interrogatories, First set and demand for production of documents.
7-8-76	Affidavit of James L. Doody.

7-22-76	Notice and Motion of plaintiff for preliminary injunction returnable 8-4-76 at 1:30 p.m.
	Notice and Motion of plaintiff to compel answers to interrogatories and the production of documents, and permit other discovery, returnable 8-4-76 at 1:30 p.m.
	Affidavit of Dale Harris.
8-4-76	Order of Court wherein plaintiff's motion to compel answers to interrogatories is denied, and all discovery, except such discovery necessary to determine jurisdiction, is stayed pending motion to dismiss or remand to County District Court.
	Notice to Counsel.
8-6-76	Notice of Motion and Motion of plaintiff for modification of and Exceptions to Discovery Order, returnable 8-20-76 at 9:30 a.m.
8-20-76	Minutes of Proceedings (Alsop, J) (Lindberg, R) motion of plaintiff to remand to District Court: argued, submitted, and taken under advisement.
9-16-76	Reporter's transcript of proceedings, re: Motion on 8-20-76.
11-19-76	Memorandum Order (Alsop, J) dated 11-18-76 that claims against Omaha Service Corp. and Credit Bureau remanded to County District Court. Notice to Counsel.
11-22-76	CC of Order (Alsop, J) remanding to District Court filed.
11-26-76	Notice of Motion and Motion to Quash Demand for Change of Venue. Brief in support of plaintiff's Motion to Quash Demand for Change of Venue and Affidavit filed.

12-14-76	Application for temporary restraining order. Affidavit of John Troyer filed.
12-22-76	Bond for Injunction filed.
1-4-77	Notice of Motion and Motion for Partial Summary Judgment or Temporary Injunction filed.
1-10-77	Stipulation of Entry of Order, Order Allowing Intervention, Complaint of Plaintiff Intervenor, and Notice of Motion and Motion to Intervene filed.
1-13-77	Notice of Motion and Motion, Letter filed.
1-21-77	Nine Affidavits filed.
1-25-77	Separate Answer and Crossclaim of Credit Bureau filed.
1-28-77	Plaintiff-Intervenor's memorandum filed.
2-18-77	Findings of Fact, Conclusions of Law, and Order for Judgment filed. Memorandum filed.
	Summons, Complaint, Memorandum of First of Omaha Service Corp. in Opposition to Application for Temporary Restraining Order, Affidavit of Dale Harris, Two Affidavits of Clay R. Moore and Ten letters filed.
2-22-77	Brief in support of plaintiff's Application for a Temporary Restraining Order filed. Original and copy of Notice of Appeal. Judgment entered and roll filed.
2-24-77	Copy of Notice of Appeal given to preconference screening.
	Motion to suspend rules and provide for expedited appeal filed.
2-25-77	Response to Motion for expedited appeal filed.
3-2-77	Respondent Marquette National Bank's Response to Appellant's Motion for Stay filed.

3-8-77	Respondent Attorney General's Answer in Opposition to Motion for Stay.
3-18-77	Order filed—Appellant's Motion to Stay denied; Appeal expedited and set for en banc hearing on 4-6-77 at 9:30 a.m.; Appellant's Brief served by 3-21-77; Respondent's Brief served by 4-1-77; and Appellant's Reply Brief served by 4-3-77.
3-11-77	Appellant's reply to Respondent's and Intervenor's Objection to Proposed Briefing Schedule filed.
	Supplement to Appellant's Reply on Motion filed.
	Appellant's Motion for Stay filed.
11-10-77	Opinion and Syllabus filed—reversed—Todd, J. considered and decided by the court en banc concurring specially. Sheran, C.J., Dissenting. Scott, J., Yetka, J., Wahl, J.
12-8-77	Order filed—Petition for rehearing denied.
3-10-78	Appellant's Motion to Vacate Stay of Judgment, returnable 3-18-78, filed with service 3-10-78.
3-17-78	Memorandum in Opposition to Motion to Vacate Stay of Judgment filed with service 3-16-78.
4-10-78	Order filed and Motion to Vacate Stay of Judgment denied.
5-30-78	Certified copy of United States Supreme Court Order granting Certiorari filed.

STATE OF MINNESOTA DISTRICT COURT
County of Hennepin Fourth Judicial District

THE MARQUETTE NATIONAL BANK
OF MINNEAPOLIS,
Plaintiff,

vs.

FIRST NATIONAL BANK OF OMAHA, FIRST
OF OMAHA SERVICE CORPORATION, and
CREDIT BUREAU OF ST. PAUL, INC.
Defendants.

4-76-251

SUMMONS

The State of Minnesota to the Above-Named Defendants:

You, and each of you, are hereby summoned and required to serve upon plaintiff's attorney an Answer to the Complaint which is herewith served upon you, within twenty (20) days after service of this Summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the Complaint.

Dated: May 12, 1976

LEVITT, PALMER, BOWEN,
BEARMON & ROTMAN
By JOHN TROYER
and J. PATRICK McDAVITT
Attorneys for Plaintiff
The Marquette National Bank
of Minneapolis
500 Roanoke Building
Minneapolis, Minnesota 55402
Telephone: 339-0661

STATE OF MINNESOTA DISTRICT COURT
County of Hennepin Fourth Judicial District

THE MARQUETTE NATIONAL BANK
OF MINNEAPOLIS,
Plaintiff,

vs.

FIRST NATIONAL BANK OF OMAHA, FIRST
OF OMAHA SERVICE CORPORATION, and
CREDIT BUREAU OF ST. PAUL, INC.,
Defendants.

COMPLAINT

Plaintiff brings this Complaint against the defendants above-named, and each of them, and alleges the following:

PARTIES

1. Plaintiff, The Marquette National Bank of Minneapolis (hereinafter sometimes referred to as the "Marquette Bank"), is a national banking association having its principal office in the City of Minneapolis, County of Hennepin, State of Minnesota.

2. Defendant, First National Bank of Omaha (hereinafter sometimes referred to as the "Omaha Bank"), is a national banking association doing business and located in the State of Minnesota and with its principal office in the City of Omaha, State of Nebraska.

3. Defendant, First of Omaha Service Corporation (hereinafter sometimes referred to as the "Omaha Service Corporation"), is a corporation and wholly-owned subsidiary of the Omaha Bank, organized under the laws of the State of Nebraska, qualified to do business and doing business in the State of Minnesota, and having its principal office in the City of Omaha, State of Nebraska.

4. Defendant, Credit Bureau of St. Paul, Inc. (hereinafter sometimes referred to as the "Credit Bureau"), is a corporation organized under the laws of the State of Minnesota having its principal office in the City of St. Paul, County of Ramsey, State of Minnesota.

CAUSES OF ACTION

COUNT I

5. Marquette Bank is and has been licensed since approximately 1968 by National BankAmericard, Incorporated to issue BankAmericard credit cards. Pursuant to said license, Marquette Bank has operated a BankAmericard program in the State of Minnesota for approximately the past eight years. Under this program, which is described in Marquette Bank's BankAmericard brochure attached hereto and made a part hereof as Exhibit 1, Marquette Bank, as permitted by Minnesota law, charges a membership fee of $10 for BankAmericard credit card privileges and imposes a finance charge of 1 percent per month (an annual percentage rate of 12 percent) on the average daily balance of the monthly account of any customer who wishes to defer payment for goods and services charged to his BankAmericard account.

6. Beginning in or about November, 1975, and continuing as of the date hereof, the Omaha Bank and Omaha Service Corporation commenced a continuous and systematic solicitation campaign in the State of Minnesota urging Minnesota residents and customers of Marquette Bank's BankAmericard program to contract with the BankAmericard program operated by the Omaha Bank and Omaha Service Corporation (hereinafter referred to as the "defendants' BankAmericard program"). In connection therewith, the Omaha Bank and Omaha Service Corporation took steps on or about November 14, 1975 to have the Omaha Service Corporation qualified to do business in the State of Minnesota. In the course of and as part of said solicitation campaign for the defendants' BankAmericard program, the Credit Bureau has and continues to participate in said campaign as a soliciting agent on behalf of the Omaha Bank and Omaha Service Corporation in the State of Minnesota.

7. The aforesaid solicitation campaign conducted by the defendants has been and is being accomplished by various means including, without limitation, mass mailings of brochures and applications, as well as telephonic solicitation, to Minnesota residents, including existing customers of the Marquette Bank's BankAmericard program. Copies of the form of brochures disseminated by the Omaha Bank, Omaha Service Corporation, and the Credit Bureau are attached hereto and made a part hereof as Exhibit 2.

8. As a result of the dissemination of the aforesaid solicitation material by the defendants, Minnesota residents, including existing customers of Marquette Bank's BankAmericard program, have been and continue to be induced to contract with the defendants' BankAmericard program under credit terms which violate Minnesota Statutes, §48.185 (Laws of Minnesota, 1976, Chapter 196, Section 5).

9. Under the BankAmericard program operated by defendants, the Omaha Bank issues credit cards and extends credit to residents of the State of Minnesota under an open credit arrangement as described in Minnesota Statutes, §48.-185; there are retail merchants and banks within the State of Minnesota that are contractually bound to honor the BankAmericard credit cards issued by the Omaha Bank; goods, services and loans are delivered or furnished to residents in the State of Minnesota through purchases made with the Bank-

Americard credit cards issued by the Omaha Bank; payment for such goods, services and loans is made by residents from the State of Minnesota; and the Omaha Bank collects a FINANCE CHARGE, from its Minnesota customers wishing to defer payment, that is: (a) at a rate which exceeds the Minnesota statutory maximum of twelve percent per month, and (b) computed on a basis which exceeds the average daily balance method authorized by the Minnesota statute.

10. The Omaha Bank's aforesaid violations of Minnesota Statutes, §48.185 have caused, and continue to cause, Marquette Bank to be injured competitively in its BankAmericard program and Marquette Bank is entitled to relief against the Omaha Bank in the form of (a) an injunction against the future solicitation of defendants' BankAmericard program in the State of Minnesota in violation of Minnesota Statutes, §48.185 and from future collections of finance charges in violation thereof; and (b) Marquette Bank's costs and attorneys' fees incurred herein.

COUNT II

11. Plaintiff realleges and incorporates herein by reference all statements and allegations contained in Paragraphs 1 through 10 inclusive of this Complaint and further states and alleges as follows:

12. By reason of their participation in the aforesaid continuous and systematic solicitation campaign in the State of Minnesota for defendants' BankAmericard program and their participation with the Omaha Bank in the operation of said BankAmericard program, the Omaha Service Corporation and the Credit Bureau, and each of them, have themselves violated, and have conspired with the Omaha Bank to violate, Minnesota Statutes, §48.185 as described in Count I hereinabove.

13. As a result of these aforesaid violations of Minnesota Statutes, §48.185, Marquette Bank has been injured, and continues to be injured, competitively in its BankAmericard program and Marquette Bank is entitled to relief against the Omaha Service Corporation and the Credit Bureau, and each of them, in the form of (a) an injunction against the future solicitation of defendants' BankAmericard program in the State of Minnesota in violation of Minnesota Statutes, §48.185 and from future collections of finance charges in violation thereof; and (b) Marquette Bank's costs and attorneys' fees incurred herein.

COUNT III

14. Plaintiff realleges and incorporates herein by reference all statements and allegations contained in Paragraphs 1 through 13 inclusive of this Complaint and further states and alleges as follows:

15. As part of the solicitation campaign conducted by the Omaha Bank, Omaha Service Corporation and the Credit Bureau in the State of Minnesota for defendants' BankAmericard program, defendants, and each of them, have been and continue to be engaged in, certain deceptive trade practices in violation of Minnesota Statutes, §325.772 (Laws of Minnesota, 1973), Chapter 216, Section 2), with said defendants having knowledge of such deceptive trade practices or a financial interest in the said services being deceptively offered for sale.

16. The solicitation brochures attached as Exhibit 2 hereto which were and are disseminated by the defendants to Minnesota residents, including existing customers of Marquette Bank's BankAmericard program represent in a misleading and deceptive manner that defendants' BankAmericard program is "FREE". Defendants' BankAmericard program is not "FREE" as proclaimed in these solicitation brochures, but

rather requires a FINANCE CHARGE OF 1 1/2 percent per month (and ANNUAL PERCENTAGE RATE of 18 percent) on the previous month's unpaid balance of the monthly account of any customer who wishes to defer payment for goods and services charged to his credit card account, without taking into account payments on goods and services made during the billing cycle. Through their dissemination of the aforesaid misleading and deceptive solicitation material, defendants have thereby represented that defendants' BankAmericard services have certain characteristics and benefits which in fact they do not have.

17. By making the false and misleading representation of fact that defendants' BankAmericard program is "FREE", defendants have committed an unfair trade practice by disseminating solicitation material that disparages the Marquette Bank's BankAmericard program.

18. The solicitation brochures (Exhibit 2) disseminated by the defendants, as well as the other means of solicitation utilized by defendants, have not clearly identified defendants' BankAmericard program as one separate and distinct from the Marquette Bank's BankAmericard program. This failure by defendants to properly identify and designate their BankAmericard program as separate and distinct from that of the Marquette Bank has caused and is likely to cause confusion or misunderstanding as to the source, sponsorship, or approval of such service; has caused and is likely to cause confusion or misunderstanding as to affiliation, connection, or association of defendants' BankAmericard program with that of Marquette Bank; constitutes deceptive representations or designations of the geographic origin of defendants' BankAmericard program; and has otherwise caused and is likely to cause confusion or misunderstanding on the part of Minnesota residents

and the customers of Marquette Bank's BankAmericard program.

19. As a result of the aforesaid violations of Minnesota Statutes, §325.772, Marquette Bank has been injured competitively in its BankAmericard program and is entitled to relief against the defendants, and each of them, in the form of (a) an injunction against the future solicitation of the defendants' BankAmericard program in the State of Minnesota in violation of Minnesota Statutes, §325.772; and (b) Marquette Bank's costs and attorneys' fees incurred herein.

COUNT IV

20. Plaintiff realleges and incorporates herein by reference all statements and allegations contained in Paragraphs 1 through 19 inclusive of this Complaint and further states and alleges as follows:

21. Minnesota Statutes, §48.185 is designed to set forth the conditions under which banks, including national banking associations doing business in the State of Minnesota, may extend credit under a credit card plan or any other open-end credit arrangement with residents of the State of Minnesota and the conditions under which solicitation of such plans may be made either personally or by an agent or by mail. The Marquette Bank, as a bank extending credit in compliance with the provisions of said statute, is among the class of persons the statute was meant to protect.

22. Minnesota Statutes, §325.772 is designed to enumerate those trade practices that are deemed to be deceptive and unlawful if conducted within the State of Minnesota. The Marquette Bank, as one likely to be damaged by the deceptive trade practices of the defendants, is within the class of persons for whose protection this statute was adopted.

23. The defendants, and each of them, have willfully, wantonly or maliciously violated and conspired to violate, Minnesota Statutes, §§48.185 and 325.772, as described in Counts I, II and III hereinabove, directly and proximately causing substantial damage to Marquette Bank's business in connection with the latter's BankAmericard program, including, without limitation, loss of profits and prospective damages, the extent of which is yet to be determined but is thought to be at least in the amount of $250,000.00.

COUNT V

24. Plaintiff realleges and incorporates herein by reference all statements and allegations contained in Paragraphs 1 through 23 inclusive of this Complaint and further states and alleges as follows:

25. As alleged in Counts I, II and III hereinabove, defendants have used and continue to use illegal and unfair means to interfere with and destroy Marquette Bank's advantageous contractual and other business relationships with its BankAmericard customers. This willful, wanton or malicious interference, without legal justification or lawful purpose, violates Marquette Bank's right to carry on its lawful BankAmericard program, as protected by the laws of the State of Minnesota, and Marquette Bank is entitled to damages for all past and present instances of such tortious interference by defendants. The extent of Marquette Bank's damages, including, without limitation, loss of profits and prospective damages, is yet to be determined but is thought to be at least in the amount of $250,000.00.

26. The aforesaid acts of unfair competition and tortious interference by the defendants have caused and will continue to cause irreparable harm to the lawful conduct of Marquette Bank's BankAmericard program, for which there is no adequate remedy at law. Accordingly, Marquette Bank is entitled to injunctive relief against the continuation of said acts, and more specifically against defendants' malicious efforts to illegally coerce and induce Marquette Bank's BankAmericard customers to terminate their business relationship with the Marquette Bank.

PRAYER FOR RELIEF

WHEREFORE, plaintiff demands judgment against the defendants, and each of them, as follows:

1. An injunction enjoining and restraining the defendants, their agents, successors, employees, and all persons acting in concert or cooperation with them or at their direction, from all solicitation in the State of Minnesota for defendants' BankAmericard program, until such time as defendants' program is changed (a) to conform to the requirements of Minnesota Statutes, §48.185; and (b) by omitting any direct or indirect representations that defendants' program is free; and (c) by making a part of any such solicitation a clear and prominent statement that defendants' program is the "BankAmericard plan affiliated with the First National Bank of Omaha and has no connection or association with the BankAmericard plan operated by The Marquette National Bank of Minneapolis."

2. An injunction enjoining and restraining the defendants, their agents, successors, employees, and all persons acting in concert or cooperation with them or at their direction, from charging or collecting any finance charges from residents of the State of Minnesota under defendants' BankAmericard program except at a FINANCE CHARGE no greater than 1 percent per month (12 percent ANNUAL PERCENTAGE RATE), which is to be computed on the basis of the average daily balance of the monthly account of any customer who wishes to defer payment for goods and services charged to his BankAmericard account.

3. Compensatory damages in the amount of \$250,000.00 or in such other amount as the Court finds have and will be directly and proximately caused by defendants' unlawful and tortious conduct.

4. Punitive damages in the amount of \$750,000.00.

5. Plaintiff's costs and disbursements herein, including reasonable attorneys' fees.

6. Such other relief as appears to the Court to be necessary or just.

Dated: May 12, 1976.

LEVITT, PALMER, BOWEN,
BEARMON & ROTMAN
By JOHN TROYER
and J. PATRICK McDAVITT
Attorneys for Plaintiff
The Marquette National
Bank of Minneapolis
500 Roanoke Building
Minneapolis, Minnesota 55402
Telephone: 339-0661

STATE OF MINNESOTA
COUNTY OF HENNEPIN—ss.

JACK BELL, being first duly sworn, on oath deposes and says that he is a Senior Vice President of The Marquette National Bank of Minneapolis, plaintiff in the above-entitled action, and has knowledge of the facts stated in the foregoing Complaint; that he knows the contents of the foregoing Complaint; that the averments thereof are true of his own knowledge, save as to such as are therein stated on information and belief, and as to those, he believes them to be true.

JACK BELL

Subscribed and sworn to before me this 1st day of May, 1976.—John Troyer, Notary Public, Minnesota, Hennepin County. My commission expires 1985.
(Notarial Seal)

(Exhibits attached to Complaint omitted in printing.)

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

Civil 4-76-251

MARQUETTE NATIONAL BANK
OF MINNEAPOLIS,

Plaintiff,

vs.

FIRST NATIONAL BANK OF OMAHA, FIRST
OF OMAHA SERVICE CORPORATION, and
CREDIT BUREAU OF ST. PAUL, INC.,

Defendants.

NOTICE OF MOTION

To: Plaintiff Marquette National Bank and its attorneys John Troyer and J. Patrick McDavitt, Levitt, Palmer, Bowen, Bearmon & Rotman, 520 Roanoke Building, Minneapolis, Minnesota 55402, and defendant Credit Bureau of St. Paul, Inc. and its attorney James W. Brehl, Maun, Hazel, Green, Hayes, Simon and Aretz, 332 Hamm Building, St. Paul, Minnesota 55102.

PLEASE TAKE NOTICE that the attached motion (which was served on June 10, 1976 prior to the removal of this ac-

tion to federal court) will be brought on for hearing before the Honorable Donald Alsop on the 16th day of July at 9:00 A.M. at the Federal Court Building in St. Paul, Minnesot[illegible] as soon thereafter as counsel may be heard.

MACKALL, CROUNSE & MOORE
By CLAY R. MOORE
1000 First National Bank Building
Minneapolis, Minnesota 55402
(612) 333-1341
Attorneys for defendant
First National Bank of Omaha

Of Counsel:
Wm. E. Morrow, Jr.
Donald J. Buresh
Swarr, May, Smith & Andersen
3535 Harney Street
Omaha, Nebraska 68131

STATE OF MINNESOTA — DISTRICT COURT
County of Hennepin — Fourth Judicial District

MARQUETTE NATIONAL BANK OF MINNEAPOLIS,
Plaintiff,

vs.

FIRST NATIONAL BANK OF OMAHA, FIRST OF OMAHA SERVICE CORPORATION, and CREDIT BUREAU OF ST. PAUL, INC.,
Defendants.

MOTION

Comes now the defendant First National Bank of Omaha and appears specially and for the sole purpose of moving the Court pursuant to Rule 12.02(1) Minnesota Rules of Civil Procedure to dismiss plaintiff's complaint as to this defendant for the reason that this defendant is a national banking association located in Omaha, Douglas County, Nebraska; that by virtue of 12 U.S.C. §94 suit may be brought against it only in Douglas County, Nebraska; that venue, and therefore in this case jurisdiction, cannot be had over the person of this defendant in the District Court for the Fourth Judicial District, Hennepin County, Minnesota.

Dated: June 10, 1976.

MACKALL, CROUNSE & MOORE
By CLAY R. MOORE
1000 First National Bank Building
Minneapolis, Minnesota 55402
(612) 333-1341
Attorneys for Defendant
First National Bank of Omaha

Of Counsel:
Wm. E. Morrow, Jr.
Donald J. Buresh
Swarr, May, Smith & Andersen
3535 Harney Street
Omaha, Nebraska 68131

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

Civil 4-76-251

MARQUETTE NATIONAL BANK
OF MINNEAPOLIS,

Plaintiff,

vs.

FIRST NATIONAL BANK OF OMAHA, FIRST
OF OMAHA SERVICE CORPORATION, and
CREDIT BUREAU OF ST. PAUL, INC.,

Defendants.

NOTICE OF MOTION

To: Plaintiff Marquette National Bank of Minneapolis and their attorneys, John Troyer and J. Patrick McDavitt, Levitt, Palmer, Bowen, Bearmon & Rotman, 500 Roanoke Building, Minneapolis, Minnesota 55402, and Defendants First National Bank of Omaha and First of Omaha Service Corporation, and their attorneys, Clay R. Moore and Mackall, Crounse & Moore, 1000 First National Bank Building, Minneapolis, Minnesota 55402.

PLEASE TAKE NOTICE that the attached motion will be brought on for hearing before the Honorable Donald D. Alsop, U. S. District Judge, at 9:00 a.m. on the 16th day of July, 1976 at the Federal Court Building, St. Paul, Minnesota, or at such other time as counsel may be heard.

JAMES W. BREHL and
MAUN, HAZEL, GREEN,
HAYES, SIMON AND ARETZ
332 Hamm Building
St. Paul, Minnesota 55102
(612) 227-9231
Attorneys for Defendant
Credit Bureau of St. Paul, Inc.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

Civil 4-76-251

THE MARQUETTE NATIONAL BANK
OF MINNEAPOLIS,

Plaintiff,

v.

FIRST NATIONAL BANK OF OMAHA, FIRST
OF OMAHA SERVICE CORPORATION, and
CREDIT BUREAU OF ST. PAUL, INC.,

Defendants.

MOTION OF CREDIT BUREAU OF ST. PAUL, INC. PURSUANT TO RULE 12

MOTIONS

The defendant Credit Bureau of St. Paul, Inc. moves the Court for its Order as follows:

1. Dismissing the above-entitled action as to this defendant for failure to state a claim upon which relief can be granted pursuant to Rule 12(b)(6), Federal Rules of Civil Procedure, or alternatively,

2. Dismissing this action pursuant to Rule 12(b)(7), Federal Rules of Civil Procedure for failure to join a party indispensable under Rule 19, and

3. Such other relief as the Court may deem appropriate under the circumstances, including, if neither of the foregoing motions is granted, the requirement of payment by plaintiff of all this defendant's costs and expenses herein, including its attorneys' fees if plaintiff proceeds with its claims against this defendant and such claims ultimately are determined to be without merit.

PROCEDURAL HISTORY

This action was commenced by plaintiffs in the Minnesota District Court Hennepin County, Fourth Judicial District, on May 17, 1976. On June 3, 1976 this defendant, Credit Bureau of St. Paul, Inc. served its Answer upon plaintiff, including its Crossclaims against the other defendants. On June 10, 1976 the Answer and Crossclaims were served upon those other two defendants. On June 3, 1976, this defendant demanded change of venue in the state courts to Ramsey County, Second Judicial District.

Thereafter, on June 11, 1976 the Omaha defendants petitioned for removal to Federal District Court and this defendant joined therein.

On June 15, 1976, plaintiff served a Notice of Dismissal without Prejudice as to defendant First National Bank of Omaha. On June 16, 1976, defendant First of Omaha Service Corporation moved for dismissal of the Complaint, or, alternatively, for a more definite statement. On June 17, 1976, First National Bank of Omaha moved for dismissal of the Crossclaim against it.

GROUNDS

The purported claims for relief asserted in the Complaint designate the defendant First National Bank of Omaha as the primary defendant against whom relief is sought, and upon whom the viability of any alleged claim against the other defendants is dependent.

No separate claim for relief has been asserted against defendant Credit Bureau of St. Paul, Inc. except a generalized claim that it "conspired" with the two Omaha defendants (Count II).

Basic to all claims asserted by plaintiff in all counts of the Complaint is its allegation that there existed impropriety in First National Bank of Omaha's alleged solicitation of prospective BankAmericard customers and in finance charges announced by First National Bank of Omaha as applying to transactions which might occur under cards which might be issued by it.

The BankAmericard application form attached by plaintiff as Exhibit 2 refers only to defendant First National Bank of Omaha, without any reference to either of the other defendants. As the Complaint alleges, the claims of plaintiff arise out of the distribution of that form by First National Bank of Omaha.

In the absence of First National Bank of Omaha as a party, under Rule 19(b) in equity and good conscience this action cannot proceed and should be dismissed. Furthermore the purported voluntary dismissal by plaintiff is of questionable propriety in view of the Crosselaim by this defendant against First National Bank of Omaha served prior to plaintiff's notice as to dismissal of its claims against that defendant.

On June 17, 1976, First National of Omaha moved for dismissal of the Crossclaim, claiming that the National Banking Act, §94 (12 USC 94) places the venue of any action against a national bank in the District wherein the Bank is established. If that be the case, the joinder of First National Bank of Omaha as defendant here as an indispensable party absent the Bank's consent would not be permitted under the last sentence of Rule 19(a). Without the Bank joined, dismissal under Rule 19(b) would be required, with plaintiff compelled to reinitiate any action in Omaha.

Of equal significance, however, is the failure of the Complaint to state a claim for relief against this defendant, Credit Bureau of St. Paul, Inc. On that independent basis, the action against this defendant should be dismissed. The Complaint fails to state specific grounds for any claim against this defendant. The necessary specificity to support a claim for relief is absent to show any manner by which this defendant "conspired" (Count II), or violated Minn. Stat. §325.722 (Count III and IV), or violated Minn. Stat. §48.185 (Count II and IV) or tortuously interfered or competed with plaintiff (Count V). Count I, while alleging this defendant's participation as an agent of defendant First National Bank of Omaha, states a claim for relief only against First National Bank of Omaha.

We presume that plaintiff's effort to include Credit Bureau of St. Paul, Inc. as a defendant has been out of a desire to place its action in the Minnesota state courts. As the other defendants in their submissions to the Court have stated, this defendant is an unnecessary party. On the other hand First National Bank of Omaha is indispensable, and under Rule 19 of the Minnesota Rules of Civil Procedure (which corresponds

to the Federal Rules), its absence would compel dismissal of the action in the state court also.

JAMES W. BREHL and
MAUN, HAZEL, GREEN,
HAYES, SIMON AND ARETZ
332 Hamm Building
St. Paul, Minnesota 55102
(612) 227-9231
Attorneys for Defendant
Credit Bureau of St. Paul, Inc.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

Civil No. 4-76-251

THE MARQUETTE NATIONAL BANK
OF MINNEAPOLIS,

Plaintiff,

vs.

FIRST NATIONAL BANK OF OMAHA, FIRST OF
OMAHA SERVICE CORPORATION, and
CREDIT BUREAU OF ST. PAUL, INC.,

Defendants.

NOTICE OF DISMISSAL
WITHOUT PREJUDICE

To: First National Bank of Omaha and Clay R. Moore, Esq., Mackall, Crounse & Moore, 1000 First National Bank Building, Minneapolis, Minnesota 55402, its attorneys

First of Omaha Service Corporation and Clay R. Moore, Esq., Mackall, Crounse & Moore, 1000 First National Bank Building, Minneapolis, Minnesota 55402, its attorneys

Credit Bureau of St. Paul, Inc. and James W. Brehl, Esq. and Garret E. Mulrooney, Esq., Maun, Hazel, Green, Hayes, Simon & Aretz, 332 Hamm Building, St. Paul, Minnesota 55102, its attorneys

Notice is hereby given that the Marquette National Bank of Minneapolis, the above-named plaintiff, elects to dismiss without prejudice its actions herein against defendant First National Bank of Omaha. Said dismissal without prejudice is made pursuant to Rule 41(a)(1)(i) of the Federal Rules of Civil Procedure, neither an answer nor motion for summary judgment having been served by said defendant First National Bank of Omaha.

Plaintiff's actions herein against defendants First of Omaha Service Corporation and Credit Bureau of St. Paul, Inc. remain and are not dismissed.

Dated: June 14, 1976.

Respectfully submitted,
LEVITT, PALMER, BOWEN,
BEARMON & ROTMAN
John Troyer
J. Patrick McDavitt
Attorneys for Plaintiff
The Marquette National
Bank of Minneapolis
500 Roanoke Building
Minneapolis, Minnesota 55402
Telephone: 339-0661

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

Civil No. 4-76-251

THE MARQUETTE NATIONAL BANK
OF MINNEAPOLIS,
Plaintiff,

vs.

FIRST NATIONAL BANK OF OMAHA, FIRST OF
OMAHA SERVICE CORPORATION and
CREDIT BUREAU OF ST. PAUL, INC.,
Defendants.

NOTICE OF MOTION AND
MOTION FOR REMAND

To: First National Bank of Omaha and First of Omaha Service Corporation, and Clay R. Moore, Esq., Mackall, Crounse & Moore, 1000 First National Bank Building, Minneapolis, Minnesota 55402, their attorneys

Credit Bureau of St. Paul, Inc. and James W. Brehl, Esq. and Garret E. Mulrooney, Esq., Maun, Hazel, Green, Hayes, Simon & Aretz, 332 Hamm Building, St. Paul, Minnesota 55102, its attorneys

YOU WILL PLEASE TAKE NOTICE that plaintiff, The Marquette National Bank of Minneapolis, will move the above-named Court before the Honorable Donald D. Alsop in Court Room 3 at the United States Court House in the City of St. Paul, Minnesota on the 16th day of July, 1976 at 9:00 a.m. for an Order, pursuant to 28 U.S.C. §1447(c), remanding the above-entitled matter to the District Court of the State of Min-

nesota for the Fourth Judicial District, Hennepin County, Minnesota, for the following reasons and grounds:

1. The causes of action alleged by plaintiff herein are based on an originate under the statutes and common law of the State of Minnesota and do not arise under federal law as required for this Court to have removal jurisdiction under 28 U.S.C. §1441(b);

2. There is no removal jurisdiction based upon diversity of citizen under 28 U.S.C. §1441(b) because plaintiff and Credit Bureau of St. Paul, Inc., one of the parties in interest properly joined and served as a defendant, are both citizens of the State of Minnesota; and

3. The causes of action against First of Omaha Service Corporation are not "separate and independent" from the causes of action against Credit Bureau of St. Paul, Inc., within the meaning of 28 U.S.C. §1441(c), and cannot be removed from the rest of the case under 28 U.S.C. §1441(c).

Dated: June 18, 1976.

Respectfully submitted,
LEVITT, PALMER, BOWEN,
BEARMON & ROTMAN
John Troyer
By J. Patrick McDavitt
Attorneys for Plaintiff
The Marquette National
Bank of Minneapolis
500 Roanoke Building
Minneapolis, Minnesota 55402
Telephone: 339-0661

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA,
FOURTH DIVISION

CIVIL ACTION NO. 4-76-251

THE MARQUETTE NATIONAL BANK
OF MINNEAPOLIS,
Plaintiff,

vs.

FIRST NATIONAL BANK OF OMAHA, FIRST OF
OMAHA SERVICE CORPORATION and
CREDIT BUREAU OF ST. PAUL, INC.,
Defendants.

AFFIDAVIT

State of Nebraska
County of Douglas—ss.

James L. Doody, being first duly sworn states upon oath that:

1. He is General Manager of First of Omaha Service Corporation and is Vice President of the First National Bank of Omaha, BankAmericard Division.

2. First of Omaha Service Corporation is a Nebraska corporation with its principal place of business in Omaha, Nebraska, and is a wholly owned subsidiary of the First National Bank of Omaha.

3. First of Omaha Service Corporation is qualified to do business in Minnesota but maintains no offices (other than its registered office c/o CT Corporation System, Inc., 405 Second Ave. S. Minneapolis, Minnesota) and has no employees in the State of Minnesota.

4. First of Omaha Service Corporation does not now and has never solicited prospective BankAmericard cardholders in

the State of Minnesota for the BankAmericard program operated by First National Bank of Omaha. Nor is First of Omaha Service Corporation a party to any agreement with the Credit Bureau of St. Paul or any other organization by which said Credit Bureau or other organization would undertake any such solicitation on its behalf. Any such agreements as do exist for purposes of soliciting prospective cardholders for the BankAmericard program operated by First National Bank of Omaha are solely between the Credit Bureau of St. Paul, Inc. and the First National Bank of Omaha.

5. The function of the First of Omaha Service Corporation in other states has been to enter into agreements with banks and merchants in the forms attached hereto as Exhibits A and B. To this date, no such agreements have been entered into with banks or merchants in the State of Minnesota.

6. The relationship between the Service Corporation and the First National Bank in the operation of the First National Bank's BankAmericard program is set forth in the agreement attached hereto as Exhibit C. The BankAmericard credit cards involved in this program are issued only by the First National Bank of Omaha based upon credit assessments made only by that Bank. The First of Omaha Service Corporation does not issue the credit cards. Any credit extended (whether by cash advance or payment of a cardholder's obligation to a merchant) is extended only by the First National Bank of Omaha (not the Service Corporation). All periodic billing statements rendered to credit card holders are prepared and rendered solely by the Bank (not the Service Corporation). All finance charges made on unpaid balances are assessed only by the Bank and the Bank alone receives and credits all payments on unpaid balances: all finance charges paid and all discount fees from participating banks and merchants are income of the Bank alone.

JAMES L. DOODY

SUBSCRIBED and sworn to before me, a Notary Public in and for said state and county, this 6th day of July, 1976. —Joan Karstetter, Notary Public, State of Nebraska. My commission expires April 18, 1979.

EXHIBIT A

AGENT BANK AGREEMENT

This agreement made and entered into between First of Omaha Service Corporation, hereinafter called Service Corporation and

hereinafter called Bank,

WITNESSETH:

WHEREAS, Service Corporation has been licensed by National BankAmericard Incorporated to use the service marks, BankAmericard, and "Blue, White and Gold Bands", certain written material and technical information and "know-how" collectively called BankAmericard Plan, and to promote and expand the BankAmericard Plan and credit card services thereunder, and

WHEREAS, Bank desires to offer BankAmericard services to citizens and merchants in its community, NOW THEREFORE

IT IS MUTUALLY covenanted and agreed between the parties hereto:

1. On behalf of and as agents for National BankAmericard Incorporated, Service Corporation hereby sponsors Bank for a license to use said service marks and written materials in offering credit card services, upon terms and conditions to be set forth by National BankAmericard Incorporated in granting the license. This agreement shall not take effect until the license is granted to you by National BankAmericard Incorporated.

2. National BankAmericard Incorporated is not a party

to this agreement and it has no responsibility hereunder with respect to the performance by the parties hereto of their duties and obligations.

3. Bank agrees to accept and comply with all of the terms and conditions of the licenses as set forth by National BankAmericard Incorporated.

4. This agreement will automatically terminate upon any affirmative act of insolvency by Service Corporation or Bank, or the filing by Service Corporation or Bank of any petition or action under any bankruptcy, reorganization, insolvency or moratorium law; or upon the filing of any voluntary petition under a bankruptcy statute by Service Corporation or Bank, or the appointment of any Receiver or Trustee to take possession of the properties of Service Corporation or Bank.

This agreement shall automatically terminate if the separate agreement between Service Corporation and First National Bank of Omaha is terminated or if National BankAmericard Incorporated terminates or revokes Service Corporation's license. Except for events which result in automatic termination, this agreement may not be terminated without 90 days written notice by either party from the date hereof. Provided however, Service Corporation may terminate this Agreement upon breach of any provision hereof by Bank, upon giving Bank thirty days written notice of its intention to terminate and the reasons therefore unless Bank remedies such breach within twenty days after receipt of such notice. Upon termination for any reason whatsoever, Bank shall deliver all BankAmericard materials and supplies to Service Corporation and shall make no other or further use thereof. The obligations of the parties hereto in effect at the date of termination hereof shall continue until they are fully performed or satisfied.

5. Bank will actively solicit Merchant Members for the BankAmericard Plan. Such Merchant Members will be en-

rolled in the BankAmericard Plan upon the terms and conditions set forth in the Merchant Members Agreement attached hereto as Exhibit A. They shall be selected in accordance with quality standards to be established from time to time by Service Corporation. Service Corporation will assist Bank in soliciting and enrolling Merchant Members and may enroll Merchant Members independently of Bank.

6. Bank will assist Merchant Members in its community in the promotion and execution of the BankAmericard Plan and will maintain continuous contact with and supervision of such Merchant Members in their BankAmericard Plan operations.

7. Bank will mail applications in their regular bank mailing (demand accounts), etc., within 90 days after signing. All inserts to be furnished by Service Corporation.

8. Bank will process all sales draft deposit envelopes submitted to it by Merchants Members, ascertain that they comply with Service Corporation's instructions, and forward them through regular banking channels to First National at Omaha, Nebraska.

9. Service Corporation will supply Bank with BankAmericard forms and supplies and Bank will furnish such materials, forms, supplies and equipment to Merchant Members in its community as is required.

10. Bank will honor any valid BankAmericard properly tendered for use and will advance such amounts of cash to the holder thereof as do not exceed a dollar limitation imposed by Service Corporation. If the holder of such BankAmericard requests cash in excess of such limitation, Bank will telephone Service Corporation's authorization facility and obtain specific authorization to draw a draft in relation thereto and such authorization shall be noted by Bank in the appropriate place on the draft.

11. Service Corporation represents that First National of Omaha has agreed to accept BankAmericard Sales and Cash Advance drafts presented to it through regular banking channels and in accordance with the terms hereof at such discount as is agreed to by Service Corporation from time to time.

12. Bank agrees to purchase from Service Corporation:

a. Any cash advance draft which originated with Bank and concerning which

i. The draft exceeds the dollar limitation and has not been otherwise specifically authorized by Service Corporation or

ii. The draft is illegible, or

iii. The draft is alleged to have been drawn improperly or without authority, or

iv. The BankAmericard was invalid at the time the draft was drawn as determined by the card's format and current void lists provided by Service Corporation.

13. Service Corporation will pay to Bank as compensation for its services hereunder an amount equal to 20% of the net merchant discount on sales drafts forwarded to First National of Omaha by Merchant Members in Bank's community and $.50 for each cash advance transaction.

14. Service Corporation will furnish Bank from time to time with advertising materials and supplies such as radio tapes, newspaper mats and copy. Service Corporation shall make available to Bank other advertising materials at a reasonable cost from time to time.

15. Bank will not use any advertisements of any description without the prior approval of Service Corporation. All materials furnished by Service Corporation shall be deemed

to be approved. Service Corporation will promptly approve or disapprove any material submitted by Bank.

16. The parties to this agreement are acting independently and nothing herein contained shall be construed to make either the agent, employee or principal of the other. Nor shall this agreement be construed as creating or establishing a partnership or a joint venture.

AGREED TO AND ACCEPTED this ——— day of ——— ———, 19—.

FIRST OF OMAHA SERVICE CORPORATION

By: ———

Title: ———

By: ———

EXHIBIT B

BANKAMERICARD MEMBER AGREEMENT

Undersigned, hereinafter called Member, whose principal place of business is .... desires to honor BankAmericards and all other "Qualified Cards" as defined in this Agreement in connection with sales of merchandise or services, and will from time to time offer to First National Bank of Omaha, through regular banking channels, sales drafts relating to such transactions for acceptance.

1. First National Bank of Omaha is not a party to this agreement.

2. The term "Card" as used in this Agreement, and whether singular or plural, shall mean only a "Qualified Card". A "Qualified Card" is any credit card conforming to the stan-

dards established by National BankAmericard Incorporated or BankAmerica Service Corporation, which card may or may not bear the name "BankAmericard" but which must bear the Blue, White and Gold Bands Design and an embossed "BAC" on the face of the card.

3. Member represents and warrants that all statements of fact within the knowledge of Member or concerning which Member has actual or constructive notice and which are contained in applications submitted by it to First of Omaha Service Corporation, hereafter called Service Corporation, are true.

4. Member will honor any valid Card properly tendered for use. Member will check each Card for validity and currency, to be determined by the Card's format and such current void lists as are provided by Service Corporation. If the total amount of any sales transaction is in excess of a dollar limitation imposed by Service Corporation, Member will telephone Service Corporation's authorization facility and obtain specific authorization to draw a sales draft relating thereto, and such authorization shall be noted by Member in the appropriate place on the sales draft. All sales drafts, and credit vouchers will be on forms supplied by Service Corporation, and will be completed to include the name of the Card holder, his account number, the name of the authorized user, the date, a description of the merchandise sold or service rendered, and the total cash price of the sale. One copy of the sales draft (or credit voucher) will be delivered to the holder or authorized user of the Card. All sales drafts tendered to First National Bank of Omaha, by Member will represent obligations of a Card holder in amounts set forth therein for merchandise sold or services rendered only and shall not involve any element of credit for any other purpose. Member agrees to indemnify

and hold Service Corporation and First National Bank of Omaha, harmless from any claim relating to any sales draft accepted by First National Bank of Omaha or acquired by Service Corporation, interposed by way of defense, dispute, offset or counterclaim. Member represents and warrants that as of the date any sales draft is placed in regular banking channels for tender to First National Bank of Omaha, Member has no knowledge or notice that would impair the validity of the sales draft or its collectibility. Member will make no special charge nor extract any special agreement, conditions or security from a Card holder in connection with any sales draft.

5. Member will establish a fair policy for the exchange and return of merchandise and for adjustment for services rendered, and will give proper credit or refund for all such returns and will issue credit vouchers therefor. Members will deliver one copy of the credit voucher to the Card holder and will forward one copy of the credit voucher to Service Corporation together with payment to the order of Service Corporation of the net amount received by member for the sales draft to which the credit voucher relates. All credit vouchers will be forwarded by United States mail on or before the third banking business day after they are issued.

6. Member will forward all sales drafts for acceptance through regular banking channels and in deposit envelopes and with other forms provided by the Service Corporation. Member will deposit separately all sales drafts relating to Card holders whose account numbers are prefixed with the number 4418. All sales drafts will be deposited pursuant to instructions from Service Corporation.

7. Service Corporation will provide Member with an appropriate number of sales draft imprinters, which will remain the exclusive property of Service Corporation. Member shall

return such imprinters in good condition to Service Corporation upon termination of this Agreement. Member will pay an annual Service and Maintenance Fee as established from time to time by Service Corporation.

8. Service Corporation represents that First National Bank of Omaha has agreed to accept Card sales drafts presented to it through regular banking channels at such discount as is agreed upon between Member and Service Corporation from time to time. Each sales draft shall be placed in regular banking channels by Member on or before the third banking business day following the date of issuance. All such sales drafts will be endorsed by Member prior to placing them in regular banking channels, any holder of any of such drafts is authorized to place member's endorsement thereon. Member shall and hereby does waive notice of default or nonpayment, protest or notice of protest, demand for payment and any other demands or notices in connection with this agreement or any Sales Draft and Member consents to extensions of time granted, or compromise made, with any Card holder liable on any sales draft without affecting Member's liability thereon or under this agreement. In the event that First National Bank of Omaha fails to accept any such draft when tendered to it in compliance with this agreement, Service Corporation agrees, upon delivery thereof to it to pay the net amount thereof to Member.

9. Member agrees to pay to Service Corporation the net amount of any sales draft where: (1) merchandise is returned, whether or not a credit voucher is delivered to Service Corporation; (2) any sales transaction exceeds the dollar limitation of the Card and which has not otherwise been specifically authorized by Bank; (3) the sales draft is alleged to have been drawn, accepted or endorsed improperly or without authority;

(4) the sales draft is illegible; (5) the Card holder reasonably disputes the sale, quality, or delivery of merchandise or the performance or quality of services covered by the sales draft accepted by such a holder or authorized user; (6) the sales draft was drawn by, or depository credit given to, member in circumstances constituting a breach of any term, condition, representation, warranty, or duty of Member hereunder; or (7) the extension of credit for merchandise sold or services performed was in violation of law or the rules or regulations of any governmental agency, federal, state, local or otherwise.

10. First National Bank of Omaha shall have the sole right to receive payments on sales drafts accepted by it. Member agrees not to sue or to make any collections thereon, except as may be specifically authorized by First National Bank of Omaha. In the event of such authorization, Member agrees to hold all collections, if any, in trust for Bank and to deliver the same in kind immediately upon receipt.

11. This Agreement shall become effective on the date indicated and shall remain in full force and effect until terminated by written notice. Either party may terminate this Agreement upon such written notice at any time. All obligations of Member incurred or existing under this Agreement as of the date of termination shall survive such termination. This Agreement shall be binding upon the parties hereto, their successors or assigns.

MEMBER ....

Address ....

By ....

Accepted: ....

By ....

FIRST OF OMAHA SERVICE CORPORATION

Date ....

EXHIBIT C

This agreement made and entered into between First National Bank of Omaha, hereinafter called "Bank" and First of Omaha Service Corporation, hereinafter called Service Corporation,

WHEREAS Bank has been licensed by BankAmerica Service Corporation to use the servicemarks, "BankAmericard" and the "Blue, White and Gold Bands," certain written materials and technical information hereinafter collectively called "BankAmericard Plan" and to offer BankAmericard Services, and

WHEREAS Bank desires to actively promote and expand the BankAmericard Plan in various states, including Nebraska, Iowa and South Dakota, and

WHEREAS Service Corporation has been organized by Bank for the purpose of promoting and expanding said plan, and Bank has, sponsored Service Corporation for a license to be granted by BankAmericard Service Corporation to use said service marks and BankAmericard Plan, which license shall be upon such terms and conditions as may be set forth therein, and

WHEREAS this agreement shall be of no force or effect until said license is granted and accepted;

NOW THEREFORE it is mutually covenanted and agreed between the parties hereto:

1. Service Corporation will actively solicit Merchant Members for the BankAmericard Plan in the States of Nebraska, Iowa, and South Dakota. Such Merchant Members will be enrolled in the BankAmericard Plan upon the terms and conditions set forth in the Merchant Members Agreement attached hereto as Exhibit A. Such Merchant Members will be selected in accordance with quality standards to be established from time to time by Bank.

2. In performing its obligations hereunder Service Corporation will cooperate with and seek the assistance of other banks and will actively solicit such other banks to enter in agency bank agreement with it upon the terms and conditions set forth in the agency bank agreement attached hereto as Exhibit B.

3. Service Corporation will at all times maintain an adequate supply of BankAmericard forms and supplies and will furnish such materials, forms, supplies and equipment to Merchant Members and agent banks as required.

4. Service Corporation will assist Merchant Members and agent banks in their BankAmericard Plan operations.

5. Service Corporation will actively solicit and obtain applications for BankAmericard and will forward such applications to Bank for its approval. Upon approval of such applications by Bank at Omaha, Nebraska, Bank will issue BankAmericards and deliver them to Service Corporation at Omaha, Nebraska. Service Corporation shall promptly deliver such cards to the persons named thereon.

6. Bank will accept, at Omaha, Nebraska, through regular banking channels, all valid, properly executed sales drafts and cash advance drafts resulting from the use of any valid, unexpired, properly tendered credit card bearing either of said service marks which was issued by any licensee of BankAmerica Service Corporation or by Bank America National Trust and Savings Association presented to it by Merchant Members and agent banks enrolled by Service Corporation as herein provided for and upon the terms and conditions set forth in Exhibits A and B.

7. As compensation hereunder Bank will pay to Service Corporation $1,000.00 per month.

8. Service Corporation shall collect and retain all Merchant Members enrollment fees.

9. Bank will keep accurate books and records concerning all transactions originating with Merchant Members and Agent Banks enrolled by Service Corporation and will, upon request of Service Corporation, furnish such information as Service Corporation shall reasonably require.

10. Bank will, at Service Corporation's request, transfer to Service Corporation any BankAmericard sales draft which originated with a Merchant Member or Agent Bank enrolled by Service Corporation. The consideration for such transfer shall be the amount Bank paid for the draft by Bank.

11. Service Corporation will, at Bank's request, acquire:

a. Any BankAmericard Sales draft which has not been paid by the cardholder and which originated with a Merchant Member enrolled by Service Corporation and concerning which

(1) merchandise has been returned whether or not a credit voucher has been delivered to Service Corporation, or

(2) any sales transaction exceeds the dollar limitation and which has not otherwise been specifically authorized by Bank, or

(3) the sales draft is alleged to have been drawn, accepted or endorsed improperly or without authority, or

(4) the sales draft is illegible, or

(5) the BankAmericard holder reasonably disputes the sale, quality, or delivery of merchandise or the performance or quality of services covered by the sales draft accepted by such holder or authorized user, or

(6) the sales draft was drawn by, or depository credit given to a Merchant Member in circumstances constituting a breach of any term, condition, representation, warranty, or duty of the Merchant Member under Exhibit A, or

(7) the extension of credit for merchandise sold or services performed was in violation of law or the rules or regulations of any governmental agency, federal, state, local or otherwise.

b. Any instant cash voucher which originated with an Agent Bank concerning which

i. the draft exceeds the dollar limitation and has not been otherwise specifically authorized by Service Corporation or

ii. the draft is illegible, or

iii. the draft is alleged to have been drawn improperly or without authority, or

iv. the BankAmericard was invalid at the time the draft was drawn as determined by the card's format and current void lists provided by Service Corporation.

c. Any such sales draft or drafts totaling not more than $________ in the aggregate.

The transfer price shall be those amounts paid by Bank for such draft or drafts.

12. Except in the case of sales drafts acquired by Service Corporation in accordance with paragraphs 10 and 11 of this agreement, Bank shall have the sole right to receive payment on sales drafts accepted by it. Service Corporation agrees not

to sue or make any collections thereon except as specifically authorized or requested by Bank. In the event of such authorization or request, Service Corporation agrees to hold all collections, if any, in trust for Bank and to deliver the same in kind immediately upon receipt.

13. For purposes of this agreement, Merchant Members enrolled by Agent Banks shall be deemed to have been enrolled by Service Corporation if Service Corporation enrolled the Agent Bank.

14. This agreement shall become effective upon execution and shall continue until terminated;

a. By 60 days written notice from either party which may be given at any time, or

b. The expiration or termination of the agreement between Bank and BankAmerica Service Corporation, or

c. The expiration or termination of the license granted by BankAmerica Service Corporation to Service Corporation.

termination shall continue until they are completely fulfilled or performed.

15. This agreement shall be binding upon and inure to the benefit of the parties hereto, their successors and assigns.

16. The only parties to this agreement are Bank and Service Corporation. BankAmerica Service Corporation, Agent Banks and Merchant Members are not parties hereto and shall have no rights hereunder. Each party to this agreement acts as a principal and not as an agent for any other person, firm or corporation. Neither party hereto is an agent for the other and nothing in this agreement shall be construed as creating an agent-principal relation between them.

17. All of Bank's duties and obligations under this agreement are to be performed at Omaha, Nebraska.

??????

First of Omaha Service Corp.

??????

First National Bank of Omaha

Dated: -??-68

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

Civil No. 4-76-251

THE MARQUETTE NATIONAL BANK
OF MINNEAPOLIS,

Plaintiff,

vs.

FIRST NATIONAL BANK OF OMAHA, FIRST OF OMAHA SERVICE CORPORATION and CREDIT BUREAU OF ST. PAUL, INC.,

Defendants.

AFFIDAVIT OF DALE HARRIS

STATE OF MINNESOTA
COUNTY OF HENNEPIN—ss.

DALE HARRIS, being duly sworn, deposes and says that:

1. He is Vice President and Manager of the BankAmericard Department of the plaintiff, The Marquette National Bank of Minneapolis (hereinafter referred to as "Marquette").

2. Marquette is a national banking association with its principal offices, including its BankAmericard Department offices, located in the County of Hennepin, State of Minnesota.

3. Marquette is licensed by National BankAmericard, Incorporated (a California-based corporation) to issue BankAmericard credit cards, and Marquette has operated a BankAmericard program throughout the State of Minnesota since 1968. As shown by the application attached to the Complaint as Exhibit 1, Marquette's BankAmericard program provides for an interest rate of 1 percent per month (12 percent per year) computed on the average daily balance of the monthly account of any customer wishing to defer payment of charges to his account. In addition, Marquette charges an annual membership fee of $10 to its cardholders.

4. The First National Bank of Omaha (hereinafter referred to as the "Omaha Bank") is also a licensee of National BankAmericard, Incorporated and has issued BankAmericard credit cards in several states. Since approximately November, 1975, a continuous and systematic solicitation campaign has been conducted in the State of Minnesota urging Minnesota residents and customers of Marquette's BankAmericard program to contract with the Omaha Bank's BankAmericard program. This solicitation campaign has been conducted by various means including, without limitation, mass mailings of brochures and applications of the type attached to the Complaint as Exhibit 2, as well as telephonic solicitation. The Omaha Bank's BankAmericard program so advertised in this solicitation provides for a rate of interest of 1 1/2 percent per month (18 percent per year) computed on the previous month's unpaid balance of the monthly account of any customer deferring payment on his account. Affiant believes that no membership fee is being charged at this time to cardholders in the Omaha Bank's BankAmericard program.

5. Since November, 1975, Marquette has received, on a continuing basis, hundreds of telephone and letter inquiries

and complaints from its BankAmericard customers confused and misled by the solicitations for the Omaha Bank's BankAmericard program. A few examples of the type of communications received by Marquette in recent months are attached hereto and made a part hereof as Exhibits A through N. They are typical of the type of confusion resulting from said solicitation including, consumers believing Marquette is the source of the solicitation; that Marquette actually operates the BankAmericard program so advertised; that Marquette sponsors the Omaha Bank's BankAmericard program; and that Marquette charges its $10 membership fee on an indiscriminate basis. Customers of Marquette have threatened to terminate their business relationship with Marquette because of this confusion. Marquette has also incurred and continues to incur substantial expenses in receiving and answering the hundreds of inquiries which it has received from persons confused by the aforesaid solicitation campaign.

6. Because of the high costs involved in operating a bank credit card program, Marquette has found such a program can be maintained at a profit under the Minnesota statutory limitation on finance charges of 1 percent per month only if the program carries with it an annual membership fee permitted by Minnesota law of $10. Affiant believes the Omaha Bank's BankAmericard program is able to operate in Minnesota without a membership fee to cardholders only because it imposes finance charges of 1 1/2 percent per month in violation of Minnesota law. This has resulted in the Omaha Bank's BankAmericard program operating in Minnesota at a great competitive advantage over Marquette and over other bank credit card programs in the State, which are forced to charge a membership fee.

7. A large number of Marquette's customers are known to have already switched from Marquette's BankAmericard program to the Omaha Bank's BankAmericard program as a result of the above-mentioned solicitation campaign, and many other customers of Marquette have threatened to terminate their business relationship as a result of the solicitation and operation of the Omaha Bank's BankAmericard program as it now exists in Minnesota. Due to the fact, however, that an account does not have to advise Marquette when it terminates as a cardholder under Marquette's program in favor of the Omaha Bank's program, only a very small percentage of the total number of accounts lost by Marquette is ascertainable without discovery from defendants. Marquette faces the threat of further substantial injury by reason of loss of present customers and loss of potential customers, as long as the Omaha Bank's BankAmericard program is permitted to solicit and operate with finance charges of 1 1/2 percent per month; and, as long as the manner of solicitation continues to be misleading and confusing to customers of Marquette and to other Minnesota consumers.

DALE HARRIS

Subscribed and sworn to before me this 22nd day of July, 1976. —J. Patrick McDavitt, Notary Public, Hennepin County, Minn.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

4-76 Civ.251

MARQUETTE NATIONAL BANK
OF MINNEAPOLIS,

Plaintiff,

vs.

FIRST NATIONAL BANK OF OMAHA, FIRST
OF OMAHA SERVICE CORPORATION, and
CREDIT BUREAU OF ST. PAUL, INC.,

Defendants.

MEMORANDUM ORDER

JOHN TROYER, Esq. and J. PATRICK McDAVITT, Esq., Levitt, Palmer, Bowen, Bearmon & Rotman, Minneapolis, Minnesota, appeared for plaintiff.

CLAY R. MOORE, Esq., and FRANK A. DVORAK, Esq., Mackall, Crounse & Moore, Minneapolis, Minnesota, together with DONALD J. BURESH, Esq., Swarr, May, Smith & Andersen, Omaha, Nebraska, appeared for defendants First National Bank of Omaha and First of Omaha Service Corporation.

JAMES W. BREHL, Esq., Maun, Hazel, Green, Hayes, Simon and Aretz, St. Paul, Minnesota, appeared for defendant Credit Bureau of St. Paul, Inc.

The plaintiff, Marquette National Bank of Minneapolis (Marquette Bank), is a national banking association located and having its principal place of business in Minneapolis, Minnesota. The defendant First National Bank of Omaha (Omaha Bank) is a national banking association located and having its

principal place of business in Omaha, Nebraska. The defendant First of Omaha Service Corporation (Omaha Service Corporation) is a Nebraska corporation qualified to do business in Minnesota. The defendant Credit Bureau of St. Paul, Inc., (Credit Bureau) is a Minnesota corporation.

The case was commenced in the District Court of Hennepin County, Minnesota, by service of a summons and complaint on the Omaha Bank, the Omaha Service Corporation and the Credit Bureau. The Credit Bureau filed an answer. Pursuant to 28 U.S.C. § 1441 *et seq.*, the defendants then joined to remove the case to this court. Subsequent to the filing of the removal petition, the plaintiff voluntarily dismissed as to the Omaha Bank. The plaintiff moves to remand.

The complaint sets forth the plaintiff's causes of action in five counts. Count I substantially alleges that through acts of the Omaha Service Corporation and the Credit Bureau the Omaha Bank has induced Minnesota residents to contract with the Omaha Bank's BankAmericard program and that the Omaha Bank's BankAmericard program assesses finance charges at rates in excess of those allowed by the Minnesota Bank Credit Card Act, Minn. Stat. Ann. § 48.185.[1]

[1] Minn. Stat. Ann. § 48.185 provides in pertinent part:

(1) Any bank organized under the laws of this state, any national banking association doing business in this state, and any savings bank organized and operated pursuant to Minnesota Statutes, Chapter 50, may extend credit through an open end loan account arrangement with a debtor, pursuant to which the debtor may obtain loans from time to time by cash advances, purchase or satisfaction of the obligations of the debtor incurred pursuant to a credit card or overdraft checking plan.

* * *

(3) A bank or savings bank may collect a periodic rate of finance charge in connection with extensions of credit pursuant to this section, which rate does not exceed one percent per month computed on an amount no greater than the average daily balance of the account during each monthly billing cycle.

* * *

(6) This section shall apply to all open end credit transactions of a bank or savings bank in extending credit under an open end loan account or other open end credit arrangement to persons who are residents of this state, if the bank or savings bank induces such persons to enter into such arrangements by a continuous and systematic solicitation either personally or by an agent or by mail, and retail merchants and banks or savings banks within this state are contractually bound to honor credit cards issued by the bank or savings bank, and the goods, services and loans are delivered or furnished in this state and payment is made from this state.

* * *

(7) Any bank or savings bank extending credit in compliance with the provisions of this section, which is injured competitively by violations of this section by another bank or savings bank, may institute a civil action in the district court of this state against that bank or savings bank for an injunction prohibiting any violation of this section.

* * *

The relief provided in this subdivision is in addition to remedies otherwise available against the same conduct under the common law or statutes of this state.

* * *

Count II, after repeating the allegations of Count I, alleges in effect that the defendants Omaha Service Corporation and the Credit Bureau have themselves violated and have conspired with the Omaha Bank to violate the Minnesota Bank Credit Card Act.

Count III, repeating all previous allegations, substantially alleges that the solicitation campaign conducted by the defendants on behalf of the Omaha Bank's BankAmericard program is carried on in violation of the Minnesota Deceptive Trade Practices Act, Minn. Stat. Ann. § 325.772. Specific deceptive trade practices are then alleged.

Count IV, repeating all previous allegations, alleges in effect that the defendants have violated and have conspired to violate both the Bank Credit Card Act and the Deceptive Trade Practices Act.

Count V, repeating all previous allegations, alleges that the defendants engaged in unfair competition and tortiously in-

terfered wtih the plaintiff's contractual relationships with its own BankAmericard customers.

The plaintiff seeks a permanent injunction, compensatory damages, and punitive damages.

Preliminarily, it should be noted that, in general, removability of an action under 28 U.S.C. § 1446 is to be determined as of the time the removal petition is filed. Therefore, the proceedings in a case subsequent to removal will not defeat federal jurisdiction. 1A J. Moore, *Federal Practice* ¶ 0.517 [12], at 155 (2d ed. 1974).

The determination of whether a case commenced in a state court may be removed to federal court is governed by the provisions of 28 U.S.C. § 1441:

> (a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.
>
> (b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.
>
> (c) Whenever a separate and independent claim or cause of action, which would be removable if sued upon alone, is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters not otherwise within its original jurisdiction.

The first issue presented to the court is whether this court has removal jurisdiction based upon diversity of citizenship. Removal jurisdiction is keyed to original federal jurisdiction. Original jurisdiction in diversity cases in which the amount in controversy exceeds $10,000 requires that there be complete diversity. 28 U.S.C. § 1332. Removal jurisdiction requires both that there be complete diversity and that no defendant be a citizen of the forum state. 28 U.S.C. § 1441; 1A J. Moore, *Federal Practice* ¶ 0.161[1], at 197, 205 (2d ed. 1974).

If the court were to accept the characterizations of the parties as plaintiff and defendant as contained in the complaint, it is clear that there would be neither original nor removal jurisdiction based on diversity of citizenship. There would be no original jurisdiction because both the plaintiff and the defendant Credit Bureau are citizens of Minnesota. There would be no removal jurisdiction because the defendant Credit Bureau is a citizen of Minnesota, and Minnesota is the state in which the action is brought.

It is also clear, however, that the characterizations of the complaint are not controlling if there has been fraudulent joinder. 1A J. Moore, *Federal Practice* ¶ 0.161 [1], at 199 (2d ed. 1974). Under such circumstances parties must be aligned according to their real interests. *Boatmen's Bank v. Fritzlen*, 135 F. 650 (8th Cir.), *cert. denied*, 198 U.S. 586 (1905). Therefore, a defendant who is fraudulently joined is to be disregarded in determining the existence of diversity jurisdiction. 1A J. Moore, *Federal Practice* ¶ 0.161 [2], at 210 (2d ed. 1974). Whether the joinder is fraudulent or not depends on whether the plaintiff really intended to obtain a judgment

against the defendant whose joinder is alleged to be fraudulent. *Bolstad v. Central Surety & Ins. Corp.*, 168 F.2d 927 (8th Cir. 1948); *Harrelson v. Missouri Pac. Transp. Co.*, 87 F.2d 176 (8th Cir. 1936); *Huffman v. Baldwin*, 82 F.2d 5 (8th Cir.), *cert. denied*, 299 U.S. 550 (1936); *Leonard v. St. Joseph Lead Co.*, 75 F.2d 390 (8th Cir. 1935).

The plaintiff's complaint states causes of action based on conspiracy, deceptive trade practices and tortious interference with contractual relations against the Credit Bureau. Although it denies liability, the Credit Bureau admits certain of the acts complained of. It, therefore, seems that the plaintiff really intends to obtain a judgment against the Credit Bureau. Thus, the plaintiff's joinder of the Credit Bureau is not fraudulent, and removal on the basis of diversity of citizenship would be improper.

The second issue presented to the court is whether this court has removal jurisdiction based on a claim which, in fact, arises under the Constitution or laws of the United States. It is clear that the causes of action relating to conspiracy,[2] deceptive trade practices, unfair competition and tortious interference with contractual relations do not state claims arising under federal law. The dispute concerning original jurisdiction based upon a federal question derives from the cause of action alleging that the interest rates charged by the Omaha Bank's BankAmericard program violate Minnesota law. The plaintiff

[2] The defendants argue that allegations of a conspiracy in which a national banking association is claimed to have conspired with others to charge excessive interest rates necessarily present a federal question because interest rates charged by national banking associations are governed by federal statute and any conspiracy to violate a federal statute would present a federal question. The court does not agree. A cause of action alleging a civil conspiracy is a state law claim whether the statute to be violated is state or federal. *See Iowa ex rel. Turner v. First of Omaha Serv. Corp.*, 401 F. Supp. 439 (S.D. Iowa 1975).

argues that the complaint as filed in state court neither raises nor asserts any federal right or question, but that to the contrary it is one based solely on rights created by the Minnesota Bank Credit Card Act. The defendants, on the other hand, contend that the cause of action alleging an illegal interest rate, notwithstanding the plaintiff's characterization thereof as a violation of Minnesota law, must be construed as a claim that 12 U.S.C. § 85[3] has been violated. The defendants urge that because 12 U.S.C. § 85 preempts state regulation of interest rates charged by national banking associations, any claim that interest rates are excessive can only be litigated as a claim arising under that statute. If the plaintiff's claim does raise a federal question based soley upon 12 U.S.C. § 85, it is undisputed that original federal jurisdiction is invoked pursuant

[3] 12 U.S.C. § 85 (1976) provides in pertinent part:

> Any [national banking] association may take, receive, reserve, and charge on any loan or discount made, or upon any notes, bills of exchange, or other evidence of debt, interest at the rate allowed by the law of the State Territory, or District where the bank is located, or at a rate of 1 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal reserve bank in the Federal reserve district where the bank is located, or in the case of business or agricultural loans in the amount of $25,000 or more, at a rate of 5 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal Reserve bank in the Federal reserve district where the bank is located, whichever may be the greater and no more, except that where by the laws of any State a different rate is limited for banks organized under State laws, the rate so limited shall be allowed for associations organized or existing in any such State under this chapter. When no rate is fixed by the laws of the State, or Territory, or District, the bank may take, receive, reserve, or charge at a rate not exceeding 7 per centum, or 1 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal reserve bank in the Federal reserve district where the bank is located, or in the case of business or agricultural loans in the amount of $25,000 or more, at a rate of 5 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal Reserve bank in the Federal Reserve district where the bank is located, whichever may be the greater. . . .

to 28 U.S.C. § 1337. *Burns v. American Nat'l Bank & Trust Co.*, 479 F.2d 26 (8th Cir. 1973).

If the cause of action alleging the charging of excessive interest rates actually set forth claims which arise only under 12 U.S.C. § 85, removal was clearly in order; if it does not, remand is required. The court concludes that the plaintiff's claim based on the allegation that the Omaha Bank charges excess rates of interest does not arise under 12 U.S.C. § 85, and, therefore, remand is required.

The traditional rule in removal proceedings prohibits the court from looking outside the plaintiff's own complaint to determine whether or not a suit arises under federal law. The Supreme Court has stated the applicable tests in *Gully v. First Nat'l Bank*, 299 U.S. 109, 113 (1936):

> [A] right or immunity created by the Constitution or laws of the United States must be an element, and an essential one, of the plaintiff's cause of action. The right or immunity must be such that it will be supported if the Constitution or laws of the United States are given one construction or effect, and defeated if they receive another. A genuine and present controversy, not merely a possible or conjectural one, must exist with reference thereto, and the controversy must be disclosed upon the face of the complaint, unaided by the answer or by the petition for removal. Indeed, the complaint itself will not avail as a basis of jurisdiction in so far as it goes beyond a statement of the plaintiff's cause of action and anticipates or replies to a probable defense. [citations omitted]

It is undisputed that where the plaintiff's claim involves both a federal ground and a state ground, the plaintiff is normally free to ignore the federal question and assert only the state ground as a basis for his claim. 1A J. Moore, *Federal*

Practice ¶ 0.160, at 185 (2d ed. 1974). As the Supreme Court noted in *Great Northern Ry. v. Alexander*, 246 U.S. 276, 282 (1918):

> [T]he plaintiff may by the allegations of his complaint determine the status with respect to removability of a case . . . when it is commenced, and . . . this power to determine removability . . . continues with the plaintiff throughout the litigation, so that whether such a case . . . shall afterwards become removable depends . . . solely upon the form which the plaintiff by his voluntary action shall give to the pleadings . . . .

It is clear that the plaintiff intends to base its claims regarding the Omaha Bank's interest rates on state grounds. The plaintiff initially brought the case in state court. At no point in its complaint did the plaintiff so much as allude to 12 U.S.C. § 85, nor has it ever indicated any desire to rely on such a law. Indeed, the plaintiff has vociferously disclaimed any desire or intention to recover on anything other than a state law cause of action.

However, it is also clear that 12 U.S.C. § 85 governs the interest rates chargeable by national banks. It is equally clear that § 85 allows national banks to select an interest rate established by state law for state banks.[4] Thus, although a state by its regulation of interest rates chargeable by state banks may control the rate of interest which some national banks have selected, the state may not prohibit a national bank from selecting another rate of interest which might permit the bank

[4] The court expresses no opinion as to whether the Omaha Bank is limited to selecting a rate of interest chargeable by state banks in Minnesota when the Omaha Bank extends credit through its BankAmericard program to residents of Minnesota. *Compare Meadow Brook Nat'l Bank v. Recile*, 302 F. Supp. 62 (E.D. La. 1969), *with Fisher v. First Nat'l Bank*, 538 F. 2d 1284 (7th Cir. 1976).

to charge interest rates in excess of that allowed to state banks. Such is the case because federal law preempts state law in the area of regulation of interest rates chargeable by national banks. *Haseltine v. Central Bank of Springfield*, 183 U.S. 132 (1901); *Farmers' & Mechanics' Nat'l Bank v. Dearing*, 91 U.S. 29 (1875); *American Timber & Trading Co. v. First Nat'l Bank*, 511 F.2d 980 (9th Cir. 1973), *cert. denied*, 421 U.S. 921 (1975); *Weiner v. Bank of King of Prussia*, 358 F. Supp. 684 (E.D. Pa. 1973).

The defendants contend that the plaintiff's claim that the Omaha Bank assesses finance charges which are excessive is a claim arising under the laws of the United States. This contention is based upon an assumption that because federal law has preempted state law in the area and therefore governs the ultimate determination of the claim, the plaintiff has no state law claim based on excessive interest rates and states a federal claim whether he wishes to do so or not. *See Aveo Corp. v. Aero Lodge 735, IAM*, 390 U.S. 557 (1968); *Hearst Corp. v. Shopping Center Network, Inc.*, 307 F. Supp. 551 (S.D.N.Y. 1969); *Sylgab Steel & Wire Corp. v. Strickland Transp. Co.*, 270 F. Supp. 264 (E.D.N.Y. 1967); *Fay v. American Cystoscope Makers, Inc.*, 98 F. Supp. 278 (S.D.N.Y. 1951).

The defendants contend that the issue of the existence of a federal question is controlled by the rule laid down in *North Davis Bank v. First Nat'l Bank*, 457 F.2d 820 (10th Cir. 1972). The plaintiff in *North Davis Bank* argued that removal was improper because the complaint which it had filed in state court neither raised nor asserted any federal right or question but that the complaint was one based solely on a violation of state law. The defendant maintained, and the court agreed, that even though federal law allowed national banks to establish and operate branch banks only if the host state permitted state banks to do so, the case was one having its source in and arising under federal law and that the case was properly removed as one arising under federal law. Likewise, the defendants here assert that, although the plaintiff states its claim solely in terms of a violation of Minn. Stat. Ann. §48.185, the plaintiff's claim that the Omaha Bank's BankAmericard program assesses finance charges in excess of those allowed by law is to be justiciable only under 12 U.S.C. § 85. The defendants further assert that, therefore, the real nature of the claim is federal, irrespective of the plaintiff's characterization of its claim as a state law claim.

The court realizes that there is substantial support for the defendants' argument that federal question jurisdiction is present in cases in which federal law preempts the state law under which the cause of action arises. *See, e.g., Avco Corp. v. Aero Lodge 735, IAM*, 390 U.S. 557 (1968); *Smith v. Kansas City Title & Trust Co.*, 255 U.S. 180 (1921); *North Davis Bank v. First Nat'l Bank*, 457 F.2d 820 (10th Cir. 1972); *Ulichny v. General Elec. Co.*, 309 F. Supp. 437 (N.D.N.Y. 1970); *Suburban Trust Co. v. National Bank of Westfield*, 211 F. Supp. 694 (D.N.J. 1962); 1A J. Moore, *Federal Practice* ¶ 0.160, at 186 (2d ed. 1974). The court, however, does not think that the defendants' argument correctly states the law. 13 Wright & Miller, *Federal Practice & Procedure* § 3562 and § 3571, at 478 (1975). Federal preemption may offer a valid defense to a state law claim, but preemption does not convert a state law claim to which preemption is a defense into a claim arising under federal law. *E.g., Pan American Petroleum Corp. v. Superior Court*, 366 U.S. 656 (1961); *Gully v. First Nat'l Bank*, 299 U.S. 109 (1936); *Puerto Rico v. Russell & Co.*, 288 U.S. 476 (1933); *American Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257 (1916);

Louisville & Nashville R.R. v. Mottley, 211 U.S. 149 (1908); *La Chemise Lacoste v. Alligator Co.*, 506 F.2d 339 (3d Cir. 1974), *cert. denied*, 421 U.S. 987 (1975); *Washington v. American League*, 460 F.2d 654 (9th Cir. 1972); *Bastrop Loan Co. v. Burley*, 392 F. Supp. 970 (W.D. La. 1975); *City of New Orleans v. United Gas Pipe Line Co.*, 390 F. Supp. 861 (E.D. La. 1974); *New York ex rel. Lefkowitz v. Transcience Corp.*, 362 F. Supp. 922 (S.D.N.Y. 1973); 13 Wright & Miller, *Federal Practice & Procedure* § 3562 and § 3571 (1975).

The court thinks that the law is well-stated in *Gully v. First Nat'l Bank*, 299 U.S. 109 (1936). In *Gully*, the Supreme Court stated:

> By unimpeachable authority, a suit brought upon a state statute does not arise under an act of Congress or the Constitution of the United States because prohibited thereby. *Id.* at 116.

Thus, although federal law may well be determinative in a case in which a federal statute is raised as a defense to a state law claim, the case is not transformed automatically into one arising under federal law because of a preemption defense. In the present case, 12 U.S.C. § 85 comes into the case only by way of defense to a state-created claim. 13 Wright & Miller, *Federal Practice & Procedure* § 3571, at 478 (1975).

The court concludes that removal was not proper because the claim that the Omaha Bank charges unlawful rates of interest is not one which arises under the laws of the United States. Therefore, remand is in order.

Even if the claim that the Omaha Bank charges unlawful rates of interest were to be considered as arising under federal law, this court would nevertheless be inclined to order remand.

If the claim that the Omaha Bank charges unlawful rates of interest had been one which allowed removal, the entire case could have been removed pursuant to 28 U.S.C. § 1441. The claim that the Omaha Bank, the Omaha Service Corporation and the Credit Bureau conspired to charge rates of interest in excess of those allowed by law would be removable as a claim pendent to the one arising under federal law. The claims of deceptive trade practices, conspiracy to engage in deceptive trade practices, unfair competition and tortious interference with contract would be removable as separate and independent claims which had been joined with an otherwise removable claim.

It has long been recognized that federal courts have jurisdiction of a state law claim which is so closely related to a federal question as to be within the ancillary, or pendent, jurisdiction of the federal court. *See Hurn v. Oursler*, 289 U.S. 238 (1933). A state law claim is pendent if the state and federal claims "derive from a common nucleus of operative fact" and are such that a plaintiff "would ordinarily be expected to try them all in one judicial proceeding." *United Mine Workers v. Gibbs*, 383 U.S. 715, 725 (1966). The claims that the Omaha Bank is charging unlawful rates of interest and that the Omaha Service Corporation and the Credit Bureau conspired with the Omaha Bank to allow the Omaha Bank to do so derive from a common nucleus of operative fact. Therefore, the conspiracy claim would have been removable if the Marquette Bank's claim that the Omaha Bank charges an unlawful rate of interest had arisen under federal law.

Pursuant to 28 U.S.C. § 1441 (c), a federal court may exercise jurisdiction over the entire case whenever a separate and independent claim or cause of action, which would be removable if sued upon alone, is joined with one or more

otherwise non-removable claims or causes of action. Claims are separate and independent if the rights which the plaintiff seeks to enforce are distinct. 1A J. Moore, *Federal Practice* ¶ 0.163 [4.5], at 708 (2d ed. 1974). The right of a competitor to be free of deceptive trade practices and unfair competition and the right of a party to a contract to be free of an outsider's interference with the contract are rights which are clearly distinct from the right to expect that a bank will charge rates of interest within the limits established by law. Therefore, the entire case would have been removable if the Marquette Bank's claim that the Omaha Bank charges an unlawful rate of interest had arisen under federal law.

However, even if the entire case had been properly removed, the court would remand the non-federal claims to the District Court of Hennepin County, Minnesota. Although 12 U.S.C. § 1441 (c) provides that the federal court may determine all the issues in a case in which a removable claim is joined with one or more separate and independent non-removable claims, the court is not required to do so. Pursuant to another provision of § 1441(c), the court may remand all matters not otherwise within its original jurisdiction.

The claims against the Omaha Service Corporation and the Credit Bureau are state law claims over which the court would have no original jurisdiction. Therefore, the court is not required to retain jurisdiction over the claims against the Omaha Service Corporation and the Credit Bureau.

Subsequent to the defendants' filing of the removal petition and prior to the Omaha Bank's serving of an answer, the plainitff entered a voluntary dismissal as to the Omaha Bank pursuant to Rule 41 (a)(1)(i), Fed.R.Civ.P. Because the claim against the Omaha Bank is the only one which arguably arises under the laws of the United States, there is no longer

any claim arising under federal law before the court. Because no claim arising under federal law is still before the court, the court is persuaded that the remaining claims should be remanded. It appears to this court inappropriate to retain jurisdiction "where the federal head of jurisdiction has vanished from the case, and there has been no substantial commitment of judicial resources to the nonfederal claims." *See Murphy v. Kodz,* 351 F.2d 163 (9th Cir. 1965); *Rotermund v. United States Steel Corp.,* 346 F. Supp. 69 (E.D. Mo. 1972), *aff'd,* 474 F.2d 1139 (8th Cir. 1973). In this instance, it would make little sense to retain jurisdiction and to determine the non-federal claims even though the claim which served as a basis for federal jurisdiction is no longer at issue in the case and the defendant against whom that claim was asserted is no longer before the court.

Upon the foregoing,

IT IS ORDERED That the claims against the Omaha Service Corporation and the Credit Bureau be and the same hereby are remanded to the District Court of Hennepin County, Minnesota.

Dated: November 18, 1976.

DONALD D. ALSOP
United States District Judge

STATE OF MINNESOTA — DISTRICT COURT
County of Hennepin — Fourth Judicial District

Civil File No. 726526

THE MARQUETTE NATIONAL BANK
OF MINNEAPOLIS,
Plaintiff,
vs.
FIRST OF OMAHA SERVICE CORPORATION, and
CREDIT BUREAU OF ST. PAUL, INC.,
Defendants.

APPLICATION FOR TEMPORARY RESTRAINING ORDER

Plaintiff, The Marquette National Bank of Minneapolis, applies to the Court for a temporary restraining order pursuant to Rule 65.01 of the Minnesota Rules of Civil Procedure, enjoining defendant First of Omaha Service Corporation from all activities in connection with the solicitation and operation of the BankAmericard credit card program of the First National Bank of Omaha in the State of Minnesota, until further order of the Court.

The grounds for this application are set forth in the plaintiff's Verified Complaint herein and the Affidavit of John Troyer attached hereto and made a part hereof. Immediate and irreparable injury, loss and damage will result to plaintiff if the First of Omaha Service Corporation is not restrained from soliciting and operating the aforesaid BankAmericard program in violation of Minnesota's bank credit card statute (Minnesota Statutes, §48.185) and deceptive trade practices law (Minnesota Statutes, §325.772) as more fully described in the Verified Complaint.

Dated: December 14, 1976.

Respectfully submitted,
LEVITT, PALMER, BOWEN,
BEARMON & ROTMAN
John Troyer
J. Patrick McDavitt
Attorneys for Plaintiff
The Marquette National
Bank of Minneapolis
500 Roanoke Building
Minneapolis, Minnesota 55402
Telephone: 339-0661

STATE OF MINNESOTA — DISTRICT COURT
County of Hennepin — Fourth Judicial District

Civil File No. 726526

THE MARQUETTE NATIONAL BANK
OF MINNEAPOLIS,
Plaintiff,
vs.
FIRST OF OMAHA SERVICE CORPORATION, and
CREDIT BUREAU OF ST. PAUL, INC.,
Defendants.

TEMPORARY RESTRAINING ORDER

Upon the Application for Temporary Restraining Order and the verified Complaint of plaintiff, The Marquette National Bank of Minneapolis, the Affidavit of John Troyer, and all the files and proceedings herein,

IT IS HEREBY ORDERED that upon the filing of a Bond by the plaintiff, in the amount of $10,000.00 approved by this Court, defendant, First of Omaha Service Corporation, and all persons acting as officers, employees or agents thereof, shall refrain from engaging in any solicitation of residents of the State of Minnesota or other activity in connection with the offering or operation of a bank credit card program in the State of Minnesota in violation of Minnesota Statutes, Section 48.185 until the further order of this Court.

Let this Order be served upon the said defendant, First of Omaha Service Corporation, by serving a copy of same upon Clay R. Moore, attorney for defendant First of Omaha Service Corporation, 1000 First National Bank Building, Minneapolis, Minnesota 55402.

Dated: December 22, 1976.

By the Court
RICHARD J. KANTOROWICZ
Judge of District Court

MEMORANDUM

Plaintiff, a bank chartered under the National Banking Act in the State of Minnesota, brings this motion for a temporary restraining order forbidding defendants from soliciting BankAmericard customers and charging an interest rate greater than allowed by Minnesota Statute 48.185. Defendants are soliciting on behalf of the First National Bank of Omaha, Nebraska.

It appears that under Minnesota Law 48.185, Minnesota banks may extend loans to credit card customers at a rate not to exceed 12% (1% per month) per annum; but allows a $15.00 per year service charge to be assessed for each cardholder. Plaintiff charges only a $10.00 fee.

Defendants contend that they enjoy the privilege of a National Bank and that 12 U.S.C. §85 allows them to charge the interest rate of the state where they are located; that being 18% per annum, the rate allowed under Nebraska law.

This court finds no case cited by defendant which allows a national bank to charge an interest rate greater than the highest legal interest rate charged in the state where it operates. Defendants claim that the case of *Fisher v. First National Bank*, 538 F.2d 1284 (1976), supports their position. The decision there, in effect, follows the previous law which is to apply the most favored lending rate to national banks doing business in the state.

Although the parties argue pre-emption, none of the cases deal with this problem as a pre-emption problem. In fact, most of the cases talk in terms of most favored lending rate. Most favored lending rate is the rate given to any lender in the state, even though the maximum rate allowed a state bank is lower. In some limited cases, the national bank is able to charge a higher interest rate than a state bank.

No court has allowed a state with a high interest rate to export that high rate to another state. Such a result would be unconscionable. For a hundred years Congress has allowed states to set their own interest rates. The only prohibition has been that states could not discriminate against national banks, by limiting them to the interest charges of a state bank, if that state bank interest is less than individuals or other associations are allowed to charge. This is the so-called, most favored lender theory.

"The question whether there has been a pre-emption in a given field is always one of legislative intent." *State v. Barberian*, Rhode Island, (1965) 214 A.2d 465.

To take a statute that has been on the books for almost 100 years and find in that law an intention, in 1976, to nullify a financial practice of 200 years standing is ludicrous and makes a mockery of the doctrine of legislative intent. If there be any intent in Congress it must be to preserve the financial customs of so long a standing in our Republic.

Because this matter comes on as a motion for a Temporary Restraining Order, there may be further facts that may affect the court's decision. It is therefore necessary to take testimony. In view of the fact defendants are claiming a Minnesota law is unconstitutional as to them, the Attorney General should be notified and be given leave to intervene.

Upon Plaintiff's filing a bond of $10,000, the Temporary Restraining Order is granted.

R.J.K.

State of Minnesota,
County of Hennepin—ss.

M. L. Levitt, being duly sworn, on oath says; that on the 22nd day of December, 1976, he served the attached Temporary Restraining Order upon First of Omaha Service Corporation therein named, personally, at the offices of said defendant's attorney, Clay R. Moore, 1000 First National Bank Building in the County of Hennepin, State of Minnesota, by handing to and leaving with Clay R. Moore, true and correct copy thereof.

M. L. LEVITT

Subscribed and sworn to before me this 22nd day of December, 1976. —Carole L. Nelson, Notary Public, Hennepin County, Minnesota. My commission expires Dec. 19, 1981.

EXHIBIT B

STATE OF MINNESOTA — DISTRICT COURT
County of Hennepin — Fourth Judicial District

Civil File No. 726526

THE MARQUETTE NATIONAL BANK OF MINNEAPOLIS,
Plaintiff,

vs.

FIRST OF OMAHA SERVICE CORPORATION, and CREDIT BUREAU OF ST. PAUL, INC.,
Defendants.

TEMPORARY RESTRAINING ORDER

Upon the Application for Temporary Restraining Order and the verified Complaint of plaintiff, The Marquette National Bank of Minneapolis, the Affidavit of John Troyer, and all the files and proceedings herein,

IT IS HEREBY ORDERED that upon the filing of a Bond by the plaintiff, in the amount of $10,000.00 approved by this Court, defendant, First of Omaha Service Corporation, and all persons acting as officers, employees or agents thereof, shall refrain from engaging in any solicitation of residents of the State of Minnesota or other activity in connection with the offering or operation of a bank credit card program in the State of Minnesota in violation of Minnesota Statutes, Section 48.185 until the further order of this Court.

Let this Order be served upon the said defendant, First of Omaha Service Corporation, by serving a copy of same upon Clay R. Moore, attorney for defendant First of Omaha Service

Corporation, 1000 First National Bank Building, Minneapolis, Minnesota 55402.

Dated: December 22, 1976.

By the Court
RICHARD J. KANTOROWICZ
Judge of District Court

MEMORANDUM

Plaintiff, a bank chartered under the National Banking Act in the State of Minnesota, brings this motion for a temporary restraining order forbidding defendants from soliciting Bankamericard customers and charging an interest rate greater than allowed by Minnesota Statute 48.185. Defendants are soliciting on behalf of the First National Bank of Omaha, Nebraska.

It appears that under Minnesota Law 48.185, Minnesota banks may extend loans to credit card customers at a rate not to exceed 12% (1% per month) per annum; but allows a $15.00 per year service charge to be assessed for each cardholder. Plaintiff charges only a $10.00 fee.

Defendants contend that they enjoy the privilege of a National Bank and that 12 U.S.C. §85 allows them to charge the interest rate of the state where they are located; that being 18% per annum, the rate allowed under Nebraska law.

This court finds no case cited by defendant which allows a national bank to charge an interest rate greater than the highest legal interest rate charged in the state where it operates. Defendants claim that the case of *Fisher v. First National Bank*, 538 F.2d 1284 (1976), supports their position. The decision there, in effect, follows the previous law which is to apply the most favored lending rate to national banks doing business in the state.

Although the parties argue pre-emption, none of the cases deal with this problem as a pre-emption problem. In fact, most of the cases talk in terms of most favored lending rate. Most favored lending rate is the rate given to any lender in the state, even though the maximum rate allowed a state bank is lower. In some limited cases, the national bank is able to charge a higher interest rate than a state bank.

No court has allowed a state with a high interest rate to export that high rate to another state. Such a result would be unconscionable. For a hundred years Congress has allowed states to set their own interest rates. The only prohibition has been that states could not discriminate against national banks, by limiting them to the interest charges of a state bank, if that state bank interest is less than individuals or other associations are allowed to charge. This is the so-called, most favored lender theory.

"The question whether there has been a pre-emption in a given field is always one of legislative intent." *State v. Barberian*, Rhode Island, (1965) 214 A.2d 465.

To take a statute that has been on the books for almost 100 years and find in that law an intention, in 1976, to nullify a financial practice of 200 years standing is ludicrous and makes a mockery of the doctrine of legislative intent. If there be any intent in Congress it must be to preserve the financial customs of so long a standing in our Republic.

Because this matter comes on as a motion for a Temporary Restraining Order, there may be further facts that may affect the court's decision. It is therefore necessary to take testimony. In view of the fact defendants are claiming a Minnesota law is unconstitutional as to them, the Attorney General should be notified and be given leave to intervene.

Upon Plaintiff's filing a bond of $10,000, the Temporary Restraining Order is granted.

R.J.K.

STATE OF MINNESOTA
IN SUPREME COURT

47409

FIRST OF OMAHA SERVICE CORPORATION,
Defendant-Petitioner,

vs.

MARQUETTE NATIONAL BANK,
Plaintiff-Respondent.

PETITION FOR
WRIT OF PROHIBITION

To: The Supreme Court of the State of Minnesota

The Petitioner, defendant First of Omaha Service Corporation, requests a writ of prohibition on the following grounds:

1) This action was originally commenced in May, 1976 in the district court of Hennepin County, Fourth Judicial District under Civil File No. 726526.
2) On June 11, 1976, this action was removed to the United States District Court for the District of Minnesota, Fourth Division, and assigned to the Honorable Donald Alsop, U.S. District Judge.
3) On November 18, 1976, Judge Alsop issued his order remanding the case to the state court. (See Judge Alsop's order, Exhibit A.)

4) On December 15, 1976, plaintiff Marquette moved the state district court (Kantorowicz, J.) for a temporary restraining order prohibiting the defendant First of Omaha Service Corporation from "engaging in any solicitation or other activity" in connection with a bank credit card program "at interest rates in excess of that permitted under Minnesota Statutes §48.185".
5) On December 22, 1976, Judge Kantorowicz issued a temporary restraining order as requested with no time limit except "until further order of the Court" (See Exhibit B).
6) The Bankamericard Credit Card program, in which this defendant is involved, is a program directed and owned by the First National Bank of Omaha (the parent corporation of this defendant). The First National Bank of Omaha was originally joined as a defendant by plaintiff but, after removal to federal court (and prior to remand), was voluntarily dismissed as a defendant by the plaintiff by reason of federal venue restrictions as to suits against national banks (see 12 U.S.C. §94). The Bank Americard credit card involved, however, is issued only by the First National Bank of Omaha and all interest charges thereon are assessed by said bank and no other entity (see affidavit of James Doody, Exhibit C).
7) The rates of interest allowed to the First National Bank of Omaha are governed solely by federal law, to wit: 12 U.S.C. §85 which preempts the operation of any state law as to interest rates chargeable by national banks (see Judge Alsop's opinion, Exhibit A, page 7).
8) 12 U.S.C. §85 permits a national bank to charge the interest rates allowed by the state "where it is located";

a national bank which loans money or extends credit by use of a credit card or otherwise to a resident of another state may, if it chooses, charge those rates permitted by the laws of its home state. See *Fisher vs. First National Bank of Chicago,* (7 Cir. 1976) 538 F. 2d 1284, decided July 29, 1976, in which it was held that a national bank located in Illinois may, under 12 U.S.C. §85, charge interest rates provided in Illinois law under a credit card issued to an Iowa resident. The Court also held that the Illinois domiciled bank could, but was not required to, charge those rates allowed under Iowa law.

9) The First National Bank of Omaha charges 18% (on the first $1000 due balance) for all credit extended by it through the use of its Bank Americard credit card; these charges are in accordance with the provisions of Nebraska law, i.e., Revised Nebraska Statutes §8-820 (Exhibit D).

10) As applied to the facts of this case, 12 U.S.C. §85 as interpreted in *Fisher vs. First National Bank of Chicago,* supra, among other cases, permits the First National Bank of Omaha to extend credit to Minnesota residents through its Bank Americard credit card and to charge Minnesota residents interest rates in accordance with Nebraska law; it is not required to conform to Minnesota Statutes §48.185.

11) The exclusive remedy against a national bank for allegedly usurious interest charges is provided in 12 U.S.C. § 86 which, likewise, preempts the operation of any state law remedy. See *American Timber and Trading Co. vs. First National Bank of Oregon* (10 Cir. 1975) 511 F. 2d 980 cert. denied 955 Ct. 1588; *First National Bank of Mena vs. Nowlin* (8 Cir. 1975) 509 F. 2d 872; *American Auto Ins. vs. Albert* (D. Minn. 1952) 102 F. Supp. 542.

12) The temporary restraining order issued by the district court effectively deprives defendant First of Omaha Service Corporation of its right to engage in the limited activities it performs in connection with the credit card program directed by the First National Bank of Omaha; the restraining order would effectively require the First National Bank of Omaha to conform to Minnesota Statutes §48.185 before the defendant Service Corporation could continue those activities, thus indirectly depriving the First National Bank of Omaha of a right guaranteed to it by federal law, 12 U.S.C. §85.

13) The temporary restraining order, furthermore, has been issued solely upon the alleged authority of Minnesota Statutes §48.185 Subd. 7 (providing for injunctive relief under some circumstances); all state law remedies against a national bank for allegedly excessive interest rates have been preempted by 12 U.S.C. §86.

14) The temporary restraining order was, therefor, issued without jurisdiction and in direct contravention to the Supremacy Clause of the U.S. Constitution; in addition, the action of the district court relates to a matter that is decisive of the case. Prohibition is the appropriate remedy. See Advisory Committee Note to Rule 120, Rules of Civil Appellate Procedure.

15) The action of the district court deprives the defendant and its parent bank of the right to exercise a clear and settled federal statutory and constitutional right for which no adequate remedy exists necessitating the extraordinary relief prayed for herein.

16) The security bond of $10,000 ordered by the district court is grossly inadequate.

WHEREFORE, the petitioner prays for a writ of prohibition restraining the District Court from enforcing the temporary restraining order issued by the District Court on December 22, 1976 and vacating the same.

Dated: December 27, 1976.

MACKALL, CROUNSE
& MOORE
By Clay R. Moore
1000 First National
Bank Building
Minneapolis, Minn. 55402
Attorney for petitioner,
First of Omaha Service
Corporation

STATE OF MINNESOTA
IN SUPREME COURT

File No. 47409

FIRST OF OMAHA SERVICE CORPORATION,
Defendant-Petitioner,
vs.
THE MARQUETTE NATIONAL BANK OF MINNEAPOLIS,
Plaintiff-Respondent,
and
WARREN SPANNAUS, Attorney General,
State of Minnesota,
Applicant for Intervention.

MOTION TO INTERVENE

To: The Supreme Court of the State of Minnesota; defendant-petitioner above-named and its attorney, Clay R. Moore, Esquire, Mackall, Crounse & Moore, 1000 First National Bank Building, Minneapolis, Minnesota, 55402; and plaintiff-respondent above-named and its attorneys, John Troyer and Patrick McDavitt, Esquire, Levitt, Palmer, Bowen, Bearmon, & Rotman, 500 Roanoke Building, Minneapolis, Minnesota, 55402.

PLEASE TAKE NOTICE that on December 30, 1976, Warren Spannaus, Attorney General for the State of Minnesota, will move for an order of the Court permitting the Attorney General to intervene as a party defendant in the above-captioned action. The grounds for this motion are that the defendant-petitioner has raised a question as to the validity of Minn. Laws 1976, chapter 196, § 5, subd. 3 (codi-

fied as Minn. Stat. § 48.185, subd. 3) as applied to national banks chartered in states outside of Minnesota and the interests of the State of Minnesota require intervention on its behalf by the Attorney General. This question is presented in the letter from Clay R. Moore attached hereto as Exhibit A, and the temporary restraining order and memorandum entered December 22, 1976, by the trial court and attached hereto as Exhibit B.

Dated: December 29, 1976.

WARREN SPANNAUS
Attorney General
State of Minnesota
RICHARD B. ALLYN
Solicitor General
By STEPHEN SHAKMAN
Special Assistant
Attorney General
160 State Office Building
Saint Paul, Minnesota 55155
Telephone: (612) 296-2961
Attorneys for Applicant for
Intervention

STATE OF MINNESOTA
IN SUPREME COURT

File No. 47409

FIRST OF OMAHA SERVICE CORPORATION,
Defendant-Petitioner,

vs.

THE MARQUETTE NATIONAL BANK OF MINNEAPOLIS,
Plaintiff-Respondent,

and

WARREN SPANNAUS, Attorney General,
State of Minnesota,
Applicant for Intervention.

CORRECTION TO MOTION TO INTERVENE

In the fourth line of the Motion to Intervene, the word "defendant" should be struck and the word "plaintiff" inserted in its place. In other words, the Attorney General seeks intervention as a party plaintiff.

STEPHEN SHAKMAN
Special Assistant
Attorney General
160 State Office Building
St. Paul, Minnesota 55155
Telephone: (612) 296-2961
Attorneys for Applicant for
Intervention

EXHIBIT A

STATE OF MINNESOTA
IN SUPREME COURT

File No. 47409

FIRST OF OMAHA SERVICE CORPORATION,
Petitioner-Defendant,

v.

MARQUETTE NATIONAL BANK,
Respondent-Plaintiff,

and

STATE OF MINNESOTA,
Respondent-Intervenor.

ORDER

Based upon all the files, records, and proceedings herein,

IT IS HEREBY ORDERED that petitioner First of Omaha Service Corporation's petition for a writ of prohibition be, and the same is denied.

It is anticipated that a hearing for a temporary injunction will be held in the very near future in the district court, Rule 65.01 and 65.02, Rules of Civil Procedure, and any appeal taken from the results of that hearing pursuant to Rule 103.03(a), Rules of Civil Appellate Procedure, will be determined by this court on an expedited basis.

Dated: December 31, 1976.

By the Court
ROBERT J. SHERAN
Chief Justice

STATE OF MINNESOTA — DISTRICT COURT
County of Hennepin — Fourth Judicial District

Civil File No. 726526

THE MARQUETTE NATIONAL BANK
OF MINNEAPOLIS,
Plaintiff,

vs.

FIRST OF OMAHA SERVICE CORPORATION,
and CREDIT BUREAU OF ST. PAUL, INC.,
Defendants.

NOTICE OF MOTION AND
MOTION TO INTERVENE

To: The Hennepin County District Court; plaintiff above-named and its attorneys, John Troyer and Patrick McDavitt, Esquire, Levitt, Palmer, Bowen, Berman & Rotman, 500 Roanoke Building, Minneapolis, Minnesota 55402; and defendants above-named and their attorneys, Clay R. Moore, Esquire, Mackall, Crounse & Moore, 1000 First National Bank Building, Minneapolis, Minnesota 55402 and James Brehl, Esq., Maun, Hazel, Green, Hayes, Simon & Aretz, 332 Hamm Building, St. Paul, Minnesota.

PLEASE TAKE NOTICE that on January 7, 1977, at 3:00 p.m., or as soon thereafter as counsel can be heard, in Room 1659 of the Hennepin County Courthouse, Minneapolis, Minnesota, Warren Spannaus, Attorney General for the State of Minnesota will move for an order of the Court permitting the State of Minnesota by its Attorney General to intervene pursuant to Minn. R. Civ. P. 24 as a party plaintiff in the above-

captioned action in order to assert the claims set forth in the proposed complaint, a copy of which is attached hereto as Exhibit C. The grounds for this motion are that the defendants have raised a question as to the validity of Minn. Laws 1976, ch. 196, §5 (codified as Minn. Stat. §48.185) as applied to national banks chartered in states outside of Minnesota, and the interests of the State of Minnesota require intervention on its behalf by the Attorney General. This question is presented in a letter from Clay R. Moore attached hereto as Exhibit A, and in the temporary restraining order and memorandum entered December 22, 1976, by this Court and attached hereto as Exhibit B.

Dated: January 7, 1977.

WARREN SPANNAUS
Attorney General
RICHARD B. ALLYN
Solicitor General
THOMAS R. MUCK
Assistant Attorney General
RODERICK I. MACKENZIE
Special Assistant Attorney General
500 Metro Square Building
St. Paul, Minnesota 55101
Telephone: (612) 296-6524
Attorneys for Applicant for Intervention

EXHIBIT C

State of Minnesota — District Court
County of Hennepin — Fourth Judicial District

Civil File No. 726526

THE MARQUETTE NATIONAL BANK OF MINNEAPOLIS,
Plaintiff,

and

WARREN SPANNAUS, Attorney General, State of Minnesota,
Plaintiff-Intervenor,

vs.

FIRST OF OMAHA SERVICE CORPORATION, and CREDIT BUREAU OF ST. PAUL, INC.,
Defendants.

COMPLAINT OF PLAINTIFF-INTERVENOR

Plaintiff-intervenor for his complaint herein, states and alleges as follows:

PARTIES

1. Plaintiff-intervenor is the State of Minnesota represented by its duly elected Attorney General who brings this action pursuant to Minn. Stat. §8.01 (1974) and other applicable law.

2. Defendant, first of Omaha Service Corporation (hereinafter the "Omaha Service Corporation"), is a corporation and wholly-owned subsidiary of the First National Bank of Omaha, organized under the laws of the State of Nebraska, qualified to do business and doing business in the State of Minnesota,

and having its principal office in the City of Omaha, State of Nebraska.

3. Defendant, Credit Bureau of St. Paul, Inc. (hereinafter the "Credit Bureau"), is a corporation organized under the laws of the State of Minnesota having its principal office in the City of St. Paul, County of Ramsey, State of Minnesota.

CLAIM

4. Beginning on or about November, 1975, the First National Bank of Omaha and the Omaha Service Corporation commenced a continuous and systematic solicitation campaign in the State of Minnesota urging Minnesota residents to apply for the BankAmericard credit card issued by the First National Bank of Omaha. In connection therewith, the First National Bank of Omaha and the Omaha Service Corporation took steps on or about November 14, 1975, to have the Omaha Service Corporation qualified to do business in the State of Minnesota. In the course of, and as part of, said solicitation campaign, defendant Credit Bureau has participated in said campaign as a soliciting agent on behalf of the First National Bank of Omaha and the Omaha Service Corporation in the State of Minnesota.

5. The aforesaid solicitation campaign conducted by the defendants and the First National Bank of Omaha has been accomplished by various means including, without limitation, mass mailings of brochures and applications, as well as telephonic solicitation, to Minnesota residents.

6. Under the BankAmericard program operated by defendants and the First National Bank of Omaha, the First National Bank of Omaha issues credit cards and extends credit to residents of the State of Minnesota under an open credit arrangement as described in Minn. Stat. §48.185, subd. 6: 1) The First National Bank of Omaha and defendants induce

Minnesota residents to enter into open end credit cards credit transactions by a continuous and systematic solicitation personally, through agents, and by mail, 2) Retail merchants and banks within the State of Minnesota are contractually bound to honor the BankAmericard credit cards issued by the First National Bank of Omaha, 3) Goods, services and loans are delivered or furnished to residents in the State of Minnesota as a result of purchases made through the use of BankAmericard credit cards issued by the First National Bank of Omaha, and 4) Payment for such goods, services and loans is made by residents from the State of Minnesota.

7. Since the First National Bank of Omaha collects a finance charge from its Minnesota customers wishing to defer payment that is at a rate which exceeds the Minnesota statutory maximum of one percent per month, and is computed on a basis which exceeds the average daily balance method, Minnesota residents have been induced to enter into the First National Bank of Omaha's BankAmericard program under credit terms which violate Minn. Stat. §48.185 (Minn. Laws 1976, ch. 196, §5.).

8. By reason of their participation in the aforesaid continuous and systematic solicitation campaign in the State of Minnesota and their participation with the First National Bank of Omaha in the operation of said BankAmericard program, the Omaha Service Corporation and the Credit Bureau, and each of them, have violated, and have conspired with the First National Bank of Omaha to violate Minn. Stat. §48.185 (Minn. Laws 1976, ch. 196, §5.).

9. By reason of their participation in the aforesaid continuous and systematic solicitation campaign in the State of Minnesota and their participation with the First National Bank of Omaha in the operation of said BankAmericard pro-

gram, the Omaha Service Corporation and the Credit Bureau have exacted, and have conspired with the First National Bank of Omaha to exact, usurious interest from the citizens of Minnesota. This taking of usurious interest has resulted in a public nuisance which has caused substantial injury to the public and which clearly is contrary to Minnesota public policy.

WHEREFORE, plaintiff-intervenor respectfully prays for an order of this Court:

1. Declaring the BankAmericard program of the First National Bank of Omaha and the defendants to be in violation of Minn. Stat. §48.185.

2. Declaring that Minn. Stat. §48.185 is valid and fully applicable to the First National Bank of Omaha and the defendants herein in the operation of their BankAmericard program in Minnesota.

3. Directing the Omaha Service Corporation to credit the accounts of those Minnesota citizens who have paid BankAmericard finance charges exceeding one percent per month on the average daily balance to the First National Bank of Omaha the amounts of those finance charges which have exceeded one percent per month on the average daily balance.

4. Enjoining and restraining the defendants, their agents, successors, employees, and all persons acting in concert or co operation with them or at their direction, from all solicitation in the State of Minnesota for the BankAmericard program of the First National Bank of Omaha until such time as the program is changed to conform to the requirements of Minn. Stat. §48.185.

5. Enjoining and restraining the defendants, their agents, successors, employees, and all persons acting in concert or cooperation with them or at their direction, from charging or collecting any finance charge from residents of the State of

Minnesota under the BankAmericard program of the First National Bank of Omaha except a finance charge no greater than one percent per month (and annual percentage rate of twelve percent) which is to be computed on the basis of the average daily balance of the monthly account of any customer who wishes to defer payment for goods and services charged to his BankAmericard account.

6. Awarding plaintiff-intervenor costs and disbursements herein, including reasonable attorneys' fees.

7. Awarding plaintiff-intervenor such other relief as appears to the Court to be necessary or just.

Dated: January 7, 1977.

WARREN SPANNAUS
Attorney General
RICHARD B. ALLYN
Solicitor General
THOMAS R. MUCK
Assistant Attorney General
RODERICK I. MACKENZIE
Special Assistant Attorney General
500 Metro Square Building
St. Paul, Minnesota 55101
Telephone: (612) 296-6524
Attorneys for the State of Minnesota

STATE OF MINNESOTA — DISTRICT COURT
County of Hennepin — Fourth Judicial District

Civil File No. 726526

THE MARQUETTE NATIONAL BANK
OF MINNEAPOLIS,
Plaintiff,
vs.
FIRST OF OMAHA CORPORATION, and
CREDIT BUREAU OF ST. PAUL, INC.,
Defendants.

ORDER ALLOWING INTERVENTION

The above matter came duly on for hearing before the undersigned Judge of the above-named Court on the 7th day of January, 1977, upon the motion of Roderick I. Mackenzie, Special Assistant Attorney General, appearing for the State of Minnesota and Warren Spannaus, its Attorney General.

Upon all the records and files herein, the proposed complaint of the applicant for intervention, and the stipulation of the parties hereto, the Court, being duly advised in the premises, now makes and enters the following Order:

IT IS HEREBY ORDERED that Warren Spannaus, Attorney General of the State of Minnesota, has leave to intervene in this matter and assert his claim and be made a party plaintiff hereto.

IT IS FURTHER ORDERED that the proposed complaint of the Attorney General may stand as his complaint and that defendants have 20 days after the filing of this Order to plead or otherwise respond with respect thereto.

Dated: January 7, 1977.

By the Court
RICHARD J. KANTOROWICZ
Judge of District Court

STATE OF MINNESOTA — DISTRICT COURT
County of Hennepin — Fourth Judicial District

Civil File No. 726526

THE MARQUETTE NATIONAL BANK
OF MINNEAPOLIS,
Plaintiff,
vs.
FIRST OF OMAHA SERVICE CORPORATION and
CREDIT BUREAU OF ST. PAUL, INC.,
Defendants.

NOTICE OF MOTION AND MOTION FOR PARTIAL SUMMARY JUDGMENT OR TEMPORARY INJUNCTION

To: First of Omaha Service Corporation and Clay R. Moore, Esq., 1000 First National Bank Building, Minneapolis, Minnesota 55402, its attorney

You and each of you will please take notice that on Friday, January 7, 1977, at 3:00 p.m., or as soon thereafter as counsel may be heard, plaintiff will bring on for hearing before the Honorable Richard J. Kantorowicz of the above-named Court, at the Hennepin County Government Center, Minneapolis, Minnesota, a motion for an order:

(1) Pursuant to Rule 56.01 of the Minnesota Rules of Civil Procedure ("MRCP") for partial summary judgment declaring the BankAmericard program solicited

by defendant as being in violation of Minnesota Statutes, § 48.185 and permanently enjoining defendant, First of Omaha Service Corporation, and all persons acting as officers, employees or agents thereof, from engaging in any solicitation of residents of the State of Minnesota or other activity in connection with the offering or operation of a bank credit card program in the State of Minnesota in violation of Minnesota Statutes, §48.185; or, in the alternative,

(2) Pursuant to Rule 65.02 MRCP for a temporary injunction enjoining defendant, First of Omaha Service Corporation, and all persons acting as officers, employees or agents thereof, from engaging in any solicitation of residents of the State of Minnesota or other activity in connection with the offering or operation of a bank credit card program in the State of Minnesota in violation of Minnesota Statutes, §48.185.

This motion is based upon all of the files, records and proceedings herein, together with the stipulation of uncontested facts to be submitted jointly by the parties hereto.

Dated: January 4, 1977.

Respectfully submitted,
LEVITT, PALMER, BOWEN,
BEARMON & ROTMAN
John Troyer
J. Patrick McDavitt
By J. PATRICK McDAVITT
Attorneys for Plaintiff
The Marquette National Bank
of Minneapolis
500 Roanoke Building
Minneapolis, Minnesota 55402
Telephone: 339-0661

STATE OF MINNESOTA — DISTRICT COURT
County of Hennepin — Fourth Judicial District

Civil File No. 726526

THE MARQUETTE NATIONAL BANK
OF MINNEAPOLIS,
Plaintiff,

vs.

FIRST OF OMAHA SERVICE CORPORATION and
CREDIT BUREAU OF ST. PAUL, INC.,
Defendants.

STIPULATION OF FACTS

Plaintiff Marquette National Bank and the defendant First of Omaha Service Corporation, through their respective counsel of record, hereby stipulate and agree that the following facts are true and correct:

I

The BankAmericard plan is a national and international bank credit card system which enables cardholders to purchase goods and services from participating merchants and obtain cash advances from participating banks throughout the United States and the world. The First National Bank of Omaha, which is not a defendant herein, is a national bank with its charter address in Omaha, Nebraska, is a card issuing member in the BankAmericard plan, and as such has issued (prior to the restraining order) and intends to issue, BankAmericard credit cards to Minnesota residents who qualify for them.

II

Defendant First of Omaha Service Corporation is a wholly-owned subsidiary of First National Bank of Omaha. Its princi-

pal place of business is in Omaha, Nebraska but it is authorized to transact business in the State of Minnesota and intends, unless restrained or enjoined, to transact business in the State of Minnesota in the manner set forth and described in Paragraph III of this Stipulation.

III

Defendant First of Omaha Service Corporation will participate in the system by entering into agreements with Minnesota merchants and Minnesota banks which will govern the participation of those merchants and banks in the system. A copy of the Agreement governing the contractual arrangement between the First National Bank of Omaha and defendant First of Omaha Service Corporation is attached hereto as Exhibit "A"; a copy of the standard agreement between defendant First of Omaha Service Corporation and a merchant is attached hereto as Exhibit "B"; a copy of the standard Agreement between defendant First of Omaha Service Corporation and a bank is attached hereto as Exhibit "C". While participating Minnesota banks will not have the authority to issue cards or extend credit directly in connection with BankAmericard transactions, they will advertise the BankAmericard plan and solicit applications for BankAmericards from Minnesota residents which are then forwarded to First National Bank of Omaha for acceptance or rejection, and they will serve as a depository for BankAmericard sales drafts deposited by participating merchants with whom defendant First of Omaha Service Corporation has member agreements.

IV

The First National Bank of Omaha has solicited and intends to solicit Minnesota residents on a continuous and systematic basis, in order to induce them to enroll in the First National Bank of Omaha's BankAmericard program. This solicitation

program will be carried out by direct mail solicitation, telephone contact and through Minnesota banks. The form of BankAmericard application heretofore utilized in such Minnesota solicitation campaign is attached hereto as Exhibit "D". The form to be utilized in the future is attached as Exhibit "D-1". Exhibit "D-1" describes the BankAmericard program of the First National Bank of Omaha and sets forth the terms and conditions under which BankAmericard credit cards will be issued to Minnesota cardholder residents, including the finance charge rate structure.

V

Minnesota cardholders wishing to purchase goods and services or obtain cash advances with a BankAmericard issued by the First National Bank of Omaha, sign a BankAmericard form evidencing the transaction which is authenticated by the cardholder's BankAmericard credit card, and exchange the signed form for goods or services or cash from a participating Minnesota merchant or bank, respectively. The sales draft forms are then deposited by the participating Minnesota merchant in his account with a participating Minnesota bank for credit, which will then forward them and cash advance drafts drawn on such bank to the First National Bank of Omaha for credit.

VI

The First National Bank of Omaha renders periodic statements to its Minnesota cardholders and charges finance charges on the unpaid balance of the cardholder's account. Such finance charges are assessed at the rate of 1-1/2% per month on the first $999.99 of the customers account for an annual percentage rate of 18%, and 1% a month on amounts of $1,000 and more for an annual percentage rate of 12%. As stated in Exhibit "D-1", the finance charges assessed by the

First National Bank of Omaha are computed on the daily outstanding balance of ash advances and on the entire previous balance of purchases of goods or services before deducting any payments made during the billing cycle. No finance charges are imposed on the purchases portion of the account balance when the previous month's total balance is paid in full on or before the due date shown on the monthly statement. Minnesota cardholders may pay all of their account balance in full or defer payment by paying an installment thereof. Payments of account balances are remitted by Minnesota residents directly to the First National Bank of Omaha.

VII

The defendant First of Omaha Service Corporation and participating Minnesota banks are or will be paid a fee for their services rendered to the First National Bank of Omaha. Defendant First of Omaha Service Corporation and the participating Minnesota banks do not directly receive interest. However, the First of Omaha Service Corporation does accept assignments of delinquent accounts from the First National Bank of Omaha, and as an incident to collecting these accounts, does collect interest.

VIII

The defendant First of Omaha Service Corporation intends, unless further restrained or enjoined, to immediately commence solicitation of potential participating Minnesota banks and Minnesota merchants so that they may perform the functions described in Paragraph III and IV of this Stipulation in connection with the BankAmericard credit card program conducted by the First National Bank of Omaha. Interest rates will be assessed to Minnesota resident cardholders in the manner set forth in Paragraph VI of this Stipulation. Said interest rates are imposed by the First National Bank of Omaha in reliance on rates permitted in the State of Nebraska under Re-

vised Statutes of Nebraska, 1943, and Cumulative Supplement, Secs. 8-815—8-823, 8-825—8-829, as added by Laws 1969, Chapter 31 (L.B. No. 52) as amended, and other laws of Nebraska, which the defendant First of Omaha Service Corporation contends are permitted to be charged to Minnesota residents by virute of the provisions of the National Bank Act, Title 12 U.S.C. §85.

IX

The plaintiff the Marquette National Bank of Minneapolis ("Marquette") is asking for temporary and permanent injunction restraining the defendant First of Omaha Service Corporation, and all persons acting as officers, employees or agents thereof, from engaging in any solicitation of residents of the State of Minnesota or other activity in connection with the offering or operation of a bank credit card program in the State of Minnesota in violation of Minnesota Statutes, Section 48.185.

X

Plaintiff Marquette is a national bank with its main banking office in Minneapolis, Minnesota, is a card-issuing member in the BankAmericard plan and as such has issued and continues to issue cards to Minnesota residents who qualify for them. A copy of the current Marquette BankAmericard Application form utilized in Marquette's BankAmericard program, which is attached hereto as Exhibit "E", describes Marquette's BankAmericard program and sets forth the terms and conditions under which Marquette BankAmericard credit cards will be issued to Minnesota cardholder residents, including the finance charge rate structure.

XI

Since the enactment on April 8, 1976, of Chapter 196, Laws of Minnesota 1976, codified as Minnesota Statutes, Section

48.185, the plaintiff Marquette has assessed charges to connection with its BankAmericard credit card program in reliance on such Statute as follows: a $10 annual charge for the privilege of using the card and, in addition a finance charge equal to 1% per month (12% annual percentage rate). As stated in Exhibit "E", the finance charge of 1% per month assessed by plaintiff Marquette is computed on the average daily balance of the cardholder's amount during each monthly billing cycle, except that there the account balance is attributable solely to purchases of goods and services charged to the account during one billing cycle, and the account is paid in full before the due date of the first statement issued after the end of that billing cycle, no finance charge is charged on that balance.

Dated: January 7, 1977.

LEVITT, PALMER, BOWEN,
BEARMON & ROTMAN
By John Troyer
J. Patrick McDavitt
Attorneys for Plaintiff The
Marquette National
Bank of Minneapolis
500 Roanoke Building
Minneapolis, Minnesota 55402
Telephone 339-0661

MACKALL, CROUNSE,
& MOORE
By Clay R. Moore
Attorneys for Defendant
First of Omaha Service
Corporation
1000 First National
Bank Building
Minneapolis, Minnesota 55402
Telephone 333-1341

EXHIBIT A

This agreement made and entered into between First National Bank of Omaha, hereinafter called "Bank" and First of Omaha Service Corporation, hereinafter called Service Corporation,

WHEREAS Bank has been licensed by BankAmerica Service Corporation to use the servicemarks, "BankAmericard" and the "Blue, White and Gold Bands," certain written materials and technical information hereinafter collectively called "BankAmericard Plan" and to offer BankAmericard Services, and

WHEREAS Bank desires to actively promote and expand the BankAmericard Plan in various states, including Nebraska, Iowa and South Dakota, and

WHEREAS Service Corporation has been organized by Bank for the purpose of promoting and expanding said plan, and Bank has, sponsored Service Corporation for a license to be granted by BankAmerica Service Corporation to use said service marks and BankAmericard Plan, which license shall be upon such terms and conditions as may be set forth therein, and

WHEREAS this agreement shall be of no force or effect until said license is granted and accepted;

NOW THEREFORE it is mutually covenanted and agreed between the parties hereto:

1. Service Corporation will actively solicit Merchant Members for the BankAmericard Plan in the States of Nebraska, Iowa, and South Dakota. Such Merchant Members will be enrolled in the BankAmericard Plan upon the terms and conditions set forth in the Merchant Members Agreement attached hereto as Exhibit A. Such Merchant Members will be selected in accordance with quality standards to be established from time to time by Bank.

2. In performing its obligations hereunder Service Corporation will cooperate with and seek the assistance of other banks and will actively solicit such other banks to enter in agency bank agreement with it upon the terms and conditions set forth in the agency bank agreement attached hereto as Exhibit B.

3. Service Corporation will at all times maintain an adequate supply of BankAmericard forms and supplies and will furnish such materials, forms, supplies and equipment to Merchant Members and agent banks as required.

4. Service Corporation will assist Merchant Members and agent banks in their BankAmericard Plan operations.

5. Service Corporation will actively solicit and obtain applications for BankAmericard and will forward such applications to Bank for its approval. Upon approval of such applications by Bank at Omaha, Nebraska, Bank will issue BankAmericards and deliver them to Service Corporation at Omaha, Nebraska. Service Corporation shall promptly deliver such cards to the persons named thereon.

6. Bank will accept, at Omaha, Nebraska, through regular banking channels, all valid, properly executed sales drafts and cash advance drafts resulting from the use of any valid, unexpired, properly tendered credit card bearing either of said service marks which was issued by any licensee of BankAmerica Service Corporation or by Bank America National Trust and Savings Association presented to it by Merchant Members and agent banks enrolled by Service Corporation as herein provided for and upon the terms and conditions set forth in Exhibits A and B.

7. As compensation hereunder Bank will pay to Service Corporation $1,000.00 per month.

8. Service Corporation shall collect and retain all Merchant Members enrollment fees.

9. Bank will keep accurate books and records concerning all transactions originating with Merchant Members and Agent Banks enrolled by Service Corporation and will, upon request of Service Corporation, furnish such information as Service Corporation shall reasonably require.

10. Bank will, at Service Corporation's request, transfer to Service Corporation any BankAmericard sales draft which originated with a Merchant Member or Agent Bank enrolled by Service Corporation. The consideration for such transfer shall be the amount Bank paid for the draft by Bank.

11. Service Corporation will, at Bank's request, acquire:

a. Any BankAmericard Sales draft which has not been paid by the cardholder and which originated with a Merchant Member enrolled by Service Corporation and concerning which

(1) merchandise has been returned whether or not a credit voucher has been delivered to Service Corporation, or

(2) any sales transaction exceeds the dollar limitation and which has not otherwise been specifically authorized by Bank, or

(3) the sales draft is alleged to have been drawn, accepted or endorsed improperly or without authority, or

(4) the sales draft is illegible, or

(5) the BankAmericard holder reasonably disputes the sale, quality, or delivery of merchandise or the performance or quality of services covered by the sales draft accepted by such holder or authorized user, or

(6) the sales draft was drawn by, or depository credit given to a Merchant Member in circumstances con-

stituting a breach of any term, condition, representation, warranty, or duty of the Merchant Member under Exhibit A, or

(7) the extension of credit for merchandise sold or services performed was in violation of law or the rules or regulations of any governmental agency, federal, state, local or otherwise.

b. Any instant cash voucher which originated with an Agent Bank concerning which

i. the draft exceeds the dollar limitation and has not been otherwise specifically authorized by Service Corporation or

ii. the draft is illegible, or

iii. the draft is alleged to have been drawn improperly without authority, or

iv. the BankAmericard was invalid at the time the draft was drawn as determined by the card's format and current void lists provided by Service Corporation.

c. Any such sales draft or drafts totaling not more than $———— in the aggregate.

The transfer price shall be those amounts paid by Bank for such draft or drafts.

12. Except in the case of sales drafts acquired by Service Corporation in accordance with paragraphs 10 and 11 of this agreement, Bank shall have the sole right to receive payment on sales drafts accepted by it. Service Corporation agrees not to sue or make any collections thereon except as specifically authorized or requested by Bank. In the event of such authorization or request, Service Corporation agrees to hold all collections, if any, in trust for Bank and to deliver the same in kind immediately upon receipt.

13. For purposes of this agreement, Merchant Members enrolled by Agent Banks shall be deemed to have been enrolled by Service Corporation if Service Corporation enrolled the Agent Bank.

14. This agreement shall become effective upon execution and shall continue until terminated;

a. By 60 days written notice from either party which may be given at any time, or

b. The expiration or termination of the agreement between Bank and BankAmerica Service Corporation, or

c. The expiration or termination of the license granted by BankAmerica Service Corporation to Service Corporation.

termination shall continue until they are completely fulfilled or performed.

15. This agreement shall be binding upon and inure to the benefit of the parties hereto, their successors and assigns.

16. The only parties to this agreement are Bank and Service Corporation. BankAmerica Service Corporation, Agent Banks and Merchant Members are not parties hereto and shall have no rights hereunder. Each party to this agreement acts as a principal and not as an agent for any other person, firm or corporation. Neither party hereto is an agent for the other and nothing in this agreement shall be construed as creating an agent-principal relation between them.

17. All of Bank's duties and obligations under this agreement are to be performed at Omaha, Nebraska.

First of Omaha Service Corp.
First National Bank of Omaha

Dated: ?-??-68

EXHIBIT B
BANKAMERICARD®
Member Agreement

Undersigned, hereinafter called Member, whose principal place of business is ————————————, desires to honor BankAmericards and all other "Qualified Cards" as defined in this Agreement in connection with sales of merchandise or services, and will from time to time offer to First National Bank of Omaha, through regular banking channels, sales drafts relating to such transactions for acceptance.

1. First National Bank of Omaha is not a party to this agreement.

2. The term "Card" as used in this Agreement, and whether singular or plural, shall mean only a "Qualified Card". A "Qualified Card" is any credit card conforming to the standards established by National BankAmericard Incorporated or BankAmerica Service Corporation, which card may or may not bear the name "BankAmericard" but which must bear the Blue, White and Gold Bands Design and an embossed "BAC" on the face of the card.

3. Member represents and warrants that all statements of fact within the knowledge of Member or concerning which Member has actual or constructive notice and which are contained in applications submitted by it to First of Omaha Service Corporation, hereafter called Service Corporation, are true.

4. Member will honor any valid Card properly tendered for use. Member will check each Card for validity and currency, to be determined by the Card's format and such current void lists as are provided by Service Corporation. If the total amount of any sales transaction is in excess of a dollar limita-

tion imposed by Service Corporation, Member will telephone Service Corporation's authorization facility and obtain specific authorization to draw a sales draft relating thereto, and such authorization shall be noted by Member in the appropriate place on the sales draft. All sales drafts, and credit vouchers will be on forms supplied by Service Corporation, and will be completed to include the name of the Card holder, his account number, the name of the authorized user, the date, a description of the merchandise sold or service rendered, and the total cash price of the sale. One copy of the sales draft (or credit voucher) will be delivered to the holder or authorized user of the Card. All sales drafts tendered to First National Bank of Omaha, by Member will represent obligations of a Card holder in amounts set forth therein for merchandise sold or services rendered only and shall not involve any element of credit for any other purpose. Member agrees to indemnify and hold Service Corporation and First National Bank of Omaha, harmless from any claim relating to any sales draft accepted by First National Bank of Omaha or acquired by Service Corporation, interposed by way of defense, dispute, offset or counterclaim. Member represents and warrants that as of the date any sales draft is placed in regular banking channels for tender to First National Bank of Omaha, Member has no knowledge or notice that would impair the validity of the sales draft or its collectibility. Member will make no special charge nor extract any special agreement, conditions or security from a Card holder in connection with any sales draft.

5. Member will establish a fair policy for the exchange and return of merchandise and for adjustment for services rendered, and will give proper credit or refund for all such returns and will issue credit vouchers therefor. Members will

deliver one copy of the credit voucher to the Cardholder and will forward one copy of the credit voucher to Service Corporation together with payment to the order of Service Corporation of the net amount received by member for the sales draft to which the credit voucher relates. All credit vouchers will be forwarded by United States mail on or before the third banking business day after they are issued.

6. Member will forward all sales drafts for acceptance through regular banking channels and in deposit envelopes and with other forms provided by the Service Corporation. Member will deposit separately all sales drafts relating to Card holders whose account numbers are prefixed with the number 4418. All sales drafts will be deposited pursuant to instructions from Service Corporation.

7. Service Corporation will provide Member with an appropriate number of sales draft imprinters, which will remain the exclusive property of Service Corporation. Member shall return such imprinters in good condition to Service Corporation upon termination of this Agreement. Member will pay an annual Service and Maintenance Fee as established from time to time by Service Corporation.

8. Service Corporation represents that First National Bank of Omaha has agreed to accept Card sales drafts presented to it through regular banking channels at such discount as is agreed upon between Member and Service Corporation from time to time. Each sales draft shall be placed in regular banking channels by Member on or before the third banking business day following the date of issuance. All such sales drafts will be endorsed by Member prior to placing them in regular banking channels, any holder of any of such drafts is authorized to place member's endorsement thereon. Member shall and hereby does waive notice of default or nonpayment, protest or notice of protest, demand for payment and any other demands or notices in connection with this agreement or any Sales Draft and Member consents to extensions of time granted, or compromise made, with any Card holder liable on any sales draft without affecting Member's liability thereon or under this agreement. In the event that First National Bank of Omaha fails to accept any such draft when tendered to it in compliance with this agreement, Service Corporation agrees, upon delivery thereof to it to pay the net amount thereof to Member.

9. Member agrees to pay to Service Corporation the net amount of any sales draft where: (1) merchandise is returned, whether or not a credit voucher is delivered to Service Corporation; (2) any sales transaction exceeds the dollar limitation of the Card and which has not otherwise been specifically authorized by Bank; (3) the sales draft is alleged to have been drawn, accepted or endorsed improperly or without authority; (4) the sales draft is illegible; (5) the Card holder reasonably disputes the sale, quality, or delivery of merchandise or the performance or quality of services covered by the sales draft accepted by such a holder or authorized user; (6) the sales draft was drawn by, or depository credit given to, member in circumstances constituting a breach of any term, condition, representation, warranty, or duty of Member hereunder; or (7) the extension of credit for merchandise sold or services performed was in violation of law or the rules or regulations of any governmental agency, federal, state, local or otherwise.

10. First National Bank of Omaha shall have the sole right to receive payments on sales drafts accepted by it. Member agrees not to sue or to make any collections thereon, except as may be specifically authorized by First National Bank

of Omaha. In the event of such authorization, Member agrees to hold all collections, if any, in trust for Bank and to deliver the same in kind immediately upon receipt.

11. This Agreement shall become effective on the date indicated and shall remain in full force and effect until terminated by written notice. Either party may terminate this Agreement upon such written notice at any time. All obligations of Member incurred or existing under this Agreement as of the date of termination shall survive such termination. This Agreement shall be binding upon the parties hereto, their successors or assigns.

Member ....

Address ....

By ....

Accepted: ....

By ....

FIRST OF OMAHA SERVICE CORPORATION

Date ....

EXHIBIT C

AGENT BANK AGREEMENT

This agreement made and entered into between First of Omaha Service Corporation, hereinafter called Service Corporation and

hereinafter called Bank,

WITNESSETH:

WHEREAS, Service Corporation has been licensed by National BankAmericard Incorporated to use the service marks, BankAmericard, and "Blue, White and Gold Bands", certain written material and technical information and "know-how" collectively called BankAmericard Plan, and to promote and expand the BankAmericard Plan and credit card services thereunder, and

WHEREAS, Bank desires to offer BankAmericard services to citizens and merchants in its community, NOW THEREFORE

IT IS MUTUALLY covenanted and agreed between the parties hereto:

1. On behalf of and as agent for National BankAmericard Incorporated, Service Corporation hereby sponsors Bank for a license to use said service marks and written materials in offering credit card services, upon terms and conditions to be set forth by National BankAmericard Incorporated in granting the license. This agreement shall not take effect until the license is granted to you by National BankAmericard Incorporated.

2. National BankAmericard Incorporated is not a party to this agreement and it has no responsibility hereunder with respect to the performance by the parties hereto of their duties and obligations.

3. Bank agrees to accept and comply with all of the terms and conditions of the licenses as set forth by National BankAmericard Incorporated.

4. This agreement will automatically terminate upon any affirmative act of insolvency by Service Corporation or Bank, or the filing by Service Corporation or Bank of any petition or action under any bankruptcy, reorganization, insolvency or moratorium law; or upon the filing of any voluntary petition under a bankruptcy statute by Service Corporation or Bank, or the appointment of any Receiver or Trustee to take possession of the properties of Service Corporation or Bank.

This agreement shall automatically terminate if the separate agreement between Service Corporation and First National Bank of Omaha is terminated or if National BankAmericard Incorporated terminates or revokes Service Corporation's

license. Except for events which result in automatic termination, this agreement may not be terminated without 90 days written notice by either party from the date hereof. Provided however, Service Corporation may terminate this Agreement upon breach of any provision hereof by Bank, upon giving Bank thirty days written notice of its intention to terminate and the reasons therefore unless Bank remedies such breach within twenty days after receipts of such notice. Upon termination for any reason whatsoever, Bank shall deliver all BankAmericard materials and supplies to Service Corporation and shall make no other or further use thereof. The obligations of the parties hereto in effect at the date of termination hereof shall continue until they are fully performed or satisfied.

5. Bank will actively solicit Merchant Members for the BankAmericard Plan. Such Merchant Members will be enrolled in the BankAmericard Plan upon the terms and conditions set forth in the Merchant Members Agreement attached hereto as Exhibit A. They shall be selected in accordance with quality standards to be established from time to time by Service Corporation. Service Corporation will assist Bank in soliciting and enrolling Merchant Members and may enroll Merchant Members independently of Bank.

6. Bank will assist Merchant Members in its community in the promotion and execution of the BankAmericard Plan and will maintain continuous contact with and supervision of such Merchant Members in their BankAmericard Plan operations.

7. Bank will mail applications in their regular bank mailings (demand accounts), etc., within 90 days after signing. All inserts to be furnished by Service Corporation.

8. Bank will process all sales draft deposit envelopes submitted to it by Merchants Members, ascertain that they comply with Service Corporation's instructions, and forward them through regular banking channels to First National at Omaha, Nebraska.

9. Service Corporation will supply Bank with BankAmericard forms and supplies and Bank will furnish such materials, forms, supplies and equipment to Merchant Members in its community as is required.

10. Bank will honor any valid BankAmericard properly tendered for use and will advance such amounts of cash to the holder thereof as do not exceed a dollar limitation imposed by Service Corporation. If the holder of such BankAmericard requests cash in excess of such limitation, Bank will telephone Service Corporation's authorization facility and obtain specific authorization to draw a draft in relation thereto and such authorization shall be noted by Bank in the appropriate place on the draft.

11. Service Corporation represents that First National of Omaha has agreed to accept BankAmericard Sales and Cash Advance drafts presented to it through regular banking channels and in accordance with the terms hereof at such discount as is agreed to by Service Corporation from time to time.

12. Bank agrees to purchase from Service Corporation:

a. Any cash advance draft which originated with Bank and concerning which

i. The draft exceeds the dollar limitation and has not been otherwise specifically authorized by Service Corporation or

ii. The draft is illegible, or

iii. The draft is alleged to have been drawn improperly or without authority, or

iv. The BankAmericard was invalid at the time the draft was drawn as determined by the card's for-

mat and current void lists provided by Service Corporation.

13. Service Corporation will pay to Bank as compensation for its services hereunder an amount equal to 20% of the net merchant discount on sales drafts forwarded to First National of Omaha by Merchant Members in Bank's community and \$.50 for each cash advance transaction.

14. Service Corporation will furnish Bank from time to time with advertising materials and supplies such as radio tapes, newspaper mats and copy. Service Corporation shall make available to Bank other advertising materials at a reasonable cost from time to time.

15. Bank will not use any advertisements of any description without the prior approval of Service Corporation. All materials furnished by Service Corporation shall be deemed to be approved. Service Corporation will promptly approve or disapprove any material submitted by Bank.

16. The parties to this agreement are acting independently and nothing herein contained shall be construed to make either the agent, employee or principal of the other. Nor shall this agreement be construed as creating or establishing a partnership or a joint venture.

AGREED TO AND ACCEPTED this —— day of ————
————————, 19——.

FIRST OF OMAHA SERVICE CORPORATION

————————————

By: ————————————
Title: ————————————

By: ————————————

STATE OF MINNESOTA — DISTRICT COURT
County of Hennepin — Fourth Judicial District

Civil File No. 726526

THE MARQUETTE NATIONAL BANK
OF MINNEAPOLIS,
Plaintiff,
and
WARREN SPANNAUS, Attorney General,
State of Minnesota,
Plaintiff-Intervenor,
vs.
FIRST OF OMAHA SERVICE CORPORATION,
and CREDIT BUREAU OF ST. PAUL, INC.,
Defendants.

SEPARATE ANSWER AND CROSSCLAIM OF CREDIT BUREAU OF ST. PAUL, INC. TO THE COMPLAINT OF PLAINTIFF-INTERVENOR WARREN SPANNAUS, ATTORNEY GENERAL, STATE OF MINNESOTA

Defendant Credit Bureau of St. Paul, Inc. for its separate answer to the complaint of plaintiff-intervenor herein, alleges and states as follows:

I.

Except as hereinafter admitted, qualified, or otherwise answered, this answering defendant denies each and every allegation contained in said intervenor's complaint.

II.

Denies sufficient knowledge or information upon which to form a belief as to the truth of the allegations contained in

paragraphs 1 and 2 of the complaint, and therefore denies the same and puts the intervenor to its strict proof thereof.

III.

Admits the allegations contained in paragraph 3 of intervenor's complaint.

IV.

In answer to paragraph 4 of intervenor's complaint, this answering defendant admits that it has performed certain services for BankAmericard Division, First National Bank of Omaha, commencing on or about January 8, 1976 through on or about April 14, 1976 in connection with the offer of First National Bank of Omaha to consider applications for issuance of a BankAmericard credit card to certain persons residing in Ramsey, Dakota and Washington Counties in the State of Minnesota. This answering defendant denies that it was a soliciting agent on behalf of the First National Bank of Omaha and Omaha Service Corporation in the State of Minnesota as alleged in the intervenor's complaint. Upon information and belief, this answering defendant admits that the First National Bank of Omaha consideration of the making of the aforesaid offer commenced some time in or about November of 1975. This answering defendant denies sufficient knowledge or information to form a belief as to the truth of the remaining allegations contained in paragraph 4 of intervenor's complaint, and therefore denies the same and puts intervenor to its strict proof thereof.

V.

In answer to paragraph 5 of intervenor's complaint, this answering defendant admits that as a part of the offer of defendant First National Bank of Omaha to consider applications for issuance of a BankAmericard credit card, copies of a form of letter and application were sent to certain persons

residing in Ramsey, Dakota and Washington Counties of the State of Minnesota, and admits that there occurred telephone communication with certain persons in the same 3 counties. This answering defendant denies that it has sufficient knowledge or information upon which to form a belief as to the truth of the remaining allegations of paragraph 5 of the complaint, and therefore denies the same and puts intervenor to its strict proof thereof.

VI.

Denies sufficient knowledge or information upon which to form a belief as to the truth of the allegations contained in paragraphs 6 and 7 of intervenor's complaint, except that it is denied that this answering defendant has done, has threatened to or will do any of the acts or things therein complained of, and therefore this answering defendant denies all of the allegations contained in said paragraphs 6 and 7, and puts intervenor to its strict proof thereof.

VII.

Denies the allegations contained in paragraphs 8 and 9 of intervenor's complaint.

AFFIRMATIVE DEFENSES

VIII.

In further answer, intervenor's complaint fails to state a claim upon which relief can be granted against this answering defendant.

IX.

In further answer, intervenor's complaint herein as to this answering defendant is sham and frivolous.

X.

Alleges as defenses, estoppel, illegality of intervenor's complaint as to this answering defendant, the impropriety of the relief sought by intervenor as an unlawful restraint of trade, mootness, and duress.

CROSSCLAIM AGAINST DEFENDANT
FIRST OF OMAHA SERVICE CORPORATION

Defendant Credit Bureau of St. Paul, for its crossclaim against defendant First of Omaha Service Corporation, alleges and states:

XI.

As part of its crossclaim and as set forth fully herein, defendant and crossclaimant Credit Bureau of St. Paul, Inc. realleges and restates all matters contained and stated hereinbefore in its answer to intervenor's complaint.

XII.

Defendant and crossclaimant Credit Bureau of St. Paul, Inc. is a Minnesota corporation having its principal place of business in the City of St. Paul, County of Ramsey, State of Minnesota.

XIII.

In the event it be found that this answering defendant and crossclaimant is liable or responsible to respond in damages to the claims of intervenor for any reason whatsoever, including the award of any costs and disbursements, or attorneys' fees, then this answering defendant and crossclaimant is entitled to full indemnity therefore from defendant First of Omaha Service Corporation, with such indemnity including all costs and disbursements herein incurred by this answering defendant and crossclaimant, including attorneys' fees.

WHEREFORE, this answering defendant and crossclaimant demands judgment as follows:

1. Against plaintiff-intervenor that said plaintiff-intervenor take nothing by its complaint herein against this answering defendant and crossclaimant, and that such complaint as to this answering defendant and crossclaimant be dismissed.

2. Against plaintiff-intervenor for this answering defendant's costs and disbursements herein, including reasonable attorneys' fees.

3. In the event this defendant and crossclaimant be found liable to plaintif-intervenor in any amount and for any reason whatsoever, that this defendant and crossclaimant have judgment upon its crossclaim herein for full indemnity from and by defendant First of Omaha Service Corporation, with judgment upon such crossclaim including indemnity for all costs and disbursements incurred herein by this defendant and crossclaimant, including its attorneys' fees; and that this answering defendant and crossclaimant have such other and further relief as appears to the Court to be just and proper.

Dated this 21 day of January, 1977.

MAUN, HAZEL, GREEN,
HAYES, SIMON & ARETZ
By: JAMES W. BREHL
By: GARRETT E. MULROONEY
Attorneys for Credit Bureau
of St. Paul, Inc.
332 Hamm Building
St. Paul, Minnesota 55102
Telephone: (612) 227-9231

MAUN, HAZEL, GREEN, HAYES,
SIMON and ARETZ
Attorneys at Law
332 Hamm Building
Saint Paul, Minnesota 55102
227-9231
Area Code 612

January 24, 1977

Mr. Roderick I. Mackenzie
Special Assistant
Attorney General
Banking Division
500 Metro Square Building
St. Paul, Minnesota 55101

Re: The Marquette National Bank of Minneapolis and Warren Spannaus vs. First of Omaha Service Corporation and Credit Bureau of St. Paul, Inc.
Our File No. 18423

Dear Mr. Mackenzie:

Enclosed herewith and served upon you by United States mail please find Separate Answer and Crossclaim of Credit Bureau of St. Paul, Inc. to the Complaint of Plaintiff-Intervenor Warren Spannaus, Attorney General, State of Minnesota.

Very truly yours,
JAMES W. BREHL

JWB:pl
Enclosure

STATE OF MINNESOTA — DISTRICT COURT
County of Hennepin — Fourth Judicial District

CIVIL FILE NO. 726526

THE MARQUETTE NATIONAL BANK
OF MINNEAPOLIS,
Plaintiff,
and
WARREN SPANNAUS, ATTORNEY GENERAL,
STATE OF MINNESOTA,
Plaintiff-Intervenor,
vs.
FIRST OF OMAHA SERVICE CORPORATION, and
CREDIT BUREAU OF ST. PAUL, INC.,
Defendants.

ANSWER OF FIRST OF OMAHA SERVICE CORPORATION TO CROSSCLAIM

For its answer to the cross claim of defendant Credit Bureau of St. Paul, Inc., the defendant First of Omaha Service Corporation pleads as follows:

I

Denies each and every allegation of the crossclaim not specifically admitted or otherwise responded to hereinafter.

II

Admits that defendant Credit Bureau of St. Paul, Inc. is a Minnesota corporation having its principal place of business in Ramsey County, Minnesota.

III

Alleges that during the period of time involved no relationship existed between the defendant First of Omaha Service

Corporation and the defendant Credit Bureau of St. Paul, Inc., contractual or otherwise, which would form the basis of a claim for indemnity; nor did the defendant First of Omaha Service Corporation commit any acts which would justify such claims for indemnity; this defendant therefor denies the allegations of Paragraph XIII of the cross claim.

WHEREFORE, this answering defendant prays that the defendant Credit Bureau of St. Paul, Inc. take nothing by its cross claim and that the defendant have its costs and disbursements.

Dated:

MACKALL, CROUNSE
& MOORE
By Clay R. Moore
Attorneys for Defendant
First of Omaha Service
Corporation
1000 First National
Bank Building
Minneapolis, Minnesota 55402
333-1341

Of Counsel:
William Morrow
Donald Buresh
SWARR, MAY, SMITH
& ANDERSON
3535 Harney Street
Omaha, Nebraska 68131

STATE OF MINNESOTA — DISTRICT COURT
County of Hennepin — Fourth Judicial District

CIVIL FILE NO. 726526

MARQUETTE NATIONAL BANK
OF MINNEAPOLIS,
Plaintiff,
and
STATE OF MINNESOTA, by
WARREN SPANNAUS, its Attorney General,
Plaintiff-Intervenor,
vs.
FIRST OF OMAHA SERVICE CORPORATION, et al.
Defendant.

ANSWER TO COMPLAINT OF PLAINTIFF-INTERVENOR

The defendant, First of Omaha Service Corporation, for its answer to the complaint of intervenor, responds as follows:

I

FIRST DEFENSE

The complaint fails to state a claim upon which relief can be granted.

II

SECOND DEFENSE

The plaintiff-intervenor has failed to join an indispensable party, towit: The First National Bank of Omaha which cannot be made a party to this action by reason of Title 12 U.S.C. §94 governing venued action against National banks; pursuant to Rule 19.02, Minn. Rules of Civil Procedure, this action should be dismissed upon the grounds that it cannot, in equity

and good conscious, be permitted to proceed among the existing parties.

III

THIRD DEFENSE

The finance charges challenged by the Complaint in Intervention are to be assesed, in connection with a Bank Americard credit card program, by the First National Bank of Omaha, a national bank, located in Omaha, Nebraska; the finance charges and interest rates permitted to be assessed by a national bank are governed exclusively by Title 12 U.S.C. §85, a part of the National Bank Act, and the remedies available against a national bank are governed solely by Title 12 U.S.C. §85; said sections 85 and 86 of Title 12 U.S.C. pre-empt the operation of any state law pertaining to finance charges of a national bank by reason of the Supremacy Clause of the United States Constitution, Article VI, Clause 2, thereof; by reason thereof Minn. Stat. §48.185, which the intervenor alleges was violated, is a nullity and of no force and effect insofar as it purports to control finance charges assessed by the First National Bank of Omaha.

IV

FOURTH DEFENSE

The Attorney General of the State of Minnesota lacks standing to assert the claims made or to seek the relief prayed for in the complaint in intervention.

V

FIFTH DEFENSE

The Court lacks jurisdiction of the subject matter.

VI

SIXTH DEFENSE

Insofar as the complaint in intervention seeks relief, declaratory or otherwise, which purports to be binding upon the First National Bank of Omaha, this defendant asserts that the First National Bank of Omaha is not a party to this action, was dismissed as a party defendant on or about June 15, 1976 by the plaintiff Marquette and cannot be made a party to the action by reason of Title 12 U.S.C. §94; no relief purporting to bind the First National Bank of Omaha can, therefore be granted.

VII

SEVENTH DEFENSE

This answering defendant denies each and every allegation of Paragraphs 1 through 9 of the complaint in intervention except as hereinafter specifically admitted or otherwise pleaded to:

(a) As to Paragraph 1 of the Complaint in Intervention, admits that the Attorney General represents the State of Minnesota herein and purports to intervene pursuant to Minn. Stat. §8.01.

(b) As to Paragraph 2 of the Complaint in Intervention, admits that defendant First of Omaha Service Corporation ("Omaha Service Corporation") is a Nebraska corporation, with its principal place of business in Omaha, Nebraska, and a wholly owned subsidiary of the First National Bank of Omaha, and holds a certificate of authority issued pursuant to Minn. Stat. Chapter 303, issued on November 14, 1975 but denies that it is doing business in the State of Minnesota.

(c) Admits the allegations of Paragraph 3 of the complaint in intervention.

(d) Admits that the defendant is qualified as a foreign corporation in the State of Minnesota; denies that the defendant solicitated or urged Minnesota residents to apply for BankAmericard credit cards issued by the First National Bank of Omaha.

(e) As to this answering defendant, denies the allegations of Paragraph 5 of the complaint in intervention.

(f) As to Paragraph 6 of the complaint in intervention admits that the First National Bank of Omaha intends to issue BankAmericard credit cards and extend credit to residents of Minnesota under an arrangement which is generally characterized as an open end credit arrangement; admits that goods, service and loans are or may be delivered or furnished to residents of the State of Minnesota as a result of the use of said BankAmericard credit cards and that payment therefor is or may be made to the First National Bank of Omaha by said residents, denies the remaining allegations of Paragraph 6.

(g) Denies the allegations of Paragraph 7, 8, and 9 of the complaint in intervention.

WHEREFORE, this answering defendant prays that the plaintiff-intervenor take nothing by his pretended claim for relief and that defendant have its costs and disbursements herein.

Dated:

MACKALL, CROUNSE
& MOORE
By Clay R. Moore
Attorneys for Defendant
First of Omaha Service
Corporation
1000 First National
Bank Building
Minneapolis, Minnesota 55402
333-1341

Of Counsel:
William Morrow
Donald Buresh
SWARR, MAY, SMITH
& ANDERSON
3535 Harney Street
Omaha, Nebraska 68131

STATE OF MINNESOTA — DISTRICT COURT
County of Hennepin — Fourth Judicial District

Civil File No. 726526

THE MARQUETTE NATIONAL BANK
OF MINNEAPOLIS,
Plaintiff,
vs.
FIRST OF OMAHA SERVICE CORPORATION and
CREDIT BUREAU OF ST. PAUL, INC.,
Defendants.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER FOR PARTIAL SUMMARY JUDGMENT

The above-entitled matter was heard by the Court on January 7, 1977, on the Motion of plaintiff for Partial Summary Judgment or Temporary Injunction, and presented to the Court upon a Stipulation of Facts by the parties, Affidavit of Dale Harris, and all the files, records and proceedings herein. John Troyer and J. Patrick McDavitt of Levitt, Palmer, Bowen, Bearmon & Rotman appeared on behalf of plaintiff The Marquette National Bank of Minneapolis; Clay R. Moore of Mackall, Crounse & Moore appeared on behalf of defendant

First of Omaha Service Corporation; and Rod McKenzie from the Office of the Attorney General appeared on behalf of Intervenor State of Minnesota.

Based upon the foregoing Motion, papers, files and arguments presented, the Court now enters the following Findings of Fact, Conclusions of Law and Order for Partial Summary Judgment:

FINDINGS OF FACT

I

The BankAmericard plan is a national and international bank credit card system which enables cardholders to purchase goods and services from participating merchants and obtain cash advances from participating banks throughout the United States and the world. The First National Bank of Omaha, which is not a defendant herein, is a national bank with its charter address in Omaha, Nebraska, is a card-issuing member in the BankAmericard plan, and as such has issued (prior to the entry of this Court's December 22, 1976 Temporary Restraining Order) and intends to issue (unless further enjoined) BankAmericard credit cards to Minnesota residents who qualify for them.

II

Defendant First of Omaha Service Corporation is a wholly-owned subsidiary of First National Bank of Omaha. Its principal place of business is in Omaha, Nebraska, but it is authorized to transact business in the State of Minnesota and intends, unless restrained or enjoined, to transact business in the State of Minnesota in the manner set forth and described in Paragraph III below.

III

Defendant First of Omaha Service Corporation intends to participate in the system by entering into agreements with

Minnesota merchants and Minnesota banks which will govern the participation of those merchants and banks in the system. While participating Minnesota banks will not have the authority to issue cards or extend credit directly in connection with BankAmericard transactions, they will advertise the BankAmericard plan and solicit applications for BankAmericards from Minnesota residents which are then forwarded to First National Bank of Omaha for acceptance or rejection, and they will serve as a depository for BankAmericard sales drafts deposited by participating merchants with whom defendant First of Omaha Service Corporation has member agreements.

IV

The First National Bank of Omaha has solicited and intends to solicit Minnesota residents on a continuous and systematic basis, in order to induce them to enroll in the First National Bank of Omaha's BankAmericard program. This solicitation program will be carried out by direct mail solicitation, telephone contact and through Minnesota banks.

V

Minnesota cardholders wishing to purchase goods and services or obtain cash advances with a BankAmericard issued by the First National Bank of Omaha, sign a BankAmericard form evidencing the transaction which is authenticated by the cardholder's BankAmericard credit card, and exchange the signed form for goods or services or cash from a participating Minnesota merchant or bank, respectively. The sales draft forms are then deposited by the participating Minnesota merchant in his account with a participating Minnesota bank for credit, which will then forward them and cash advance drafts drawn on such bank to the First National Bank of Omaha for credit.

VI

The First National Bank of Omaha renders periodic statements to its Minnesota cardholders and charges finance charges on the unpaid balance of the cardholder's account. Such finance charges are assessed at the rate of 1 1/2 percent per month on the first $999.99 of the customer's account for an annual percentage rate of 18 percent, and 1 percent a month on amounts of $1,000 and more for an annual percentage rate of 12 percent. The finance charges assessed by the First National Bank of Omaha are computed on the daily outstanding balance of cash advances and on the entire previous balance of purchases of goods or services before deducting any payments made during the billing cycle. No finance charges are imposed on the purchase portion of the account balance when the previous months' total balance is paid in full on or before the due date shown on the monthly statement. Minnesota cardholders may pay all of their account balance in full or defer payment by paying an installment thereof. Payments of account balances are remitted by Minnesota residents directly to the First National Bank of Omaha.

VII

The defendant First of Omaha Service Corporation and participating Minnesota banks are or will be paid a fee for their services rendered to the First National Bank of Omaha. Defendant First of Omaha Service Corporation and the participating Minnesota banks do not directly receive interest. However, the First of Omaha Service Corporation does accept assignments of delinquent accounts from the First National Bank of Omaha, and as an incident to collecting these accounts, does collect interest.

VIII

The defendant First of Omaha Service Corporation intends, unless further restrained or enjoined, to immediately commence solicitation of potential participating Minnesota banks and Minnesota merchants so that they may perform the functions described in Paragraphs III and IV above in connection with the BankAmericard credit card program conducted by the First National Bank of Omaha. Interest rates would be assessed to Minnesota resident cardholders in the manner set forth in Paragraph VI above. Said interest rates are imposed by the First National Bank of Omaha in reliance on rates permitted in the State of Nebraska under Revised Statutes of Nebraska, 1943, and Cumulative Supplement, Sections 8-815—8-823, 8-825—8-829, as added by Laws 1969, Chapter 21 (L.B. No. 52), as amended, and other laws of Nebraska which the defendant First of Omaha Service Corporation contends are permitted to be charged to Minnesota residents by virtue of the provisions of the National Bank Act, Title 12 U.S.C. §85.

IX

Plaintiff The Marquette National Bank of Minneapolis ("Marquette") is asking for a temporary and permanent injunction restraining the defendant First of Omaha Service Corporation, and all persons acting as officers, employees or agents thereof, from engaging in any solicitation of residents of the State of Minnesota or other activity in connection with the offering or operation of a bank credit card program in the State of Minnesota in violation of Minnesota Statutes, §48.185.

X

Plaintiff Marquette is a national bank with its main banking office in Minneapolis, Minnesota, is a card-issuing member in the BankAmericard plan and as such has issued and continues to issue cards to Minnesota residents who qualify for them.

XI

Since the enactment on April 8, 1976, of Chapter 196, Laws of Minnesota 1976, codified as Minnesota Statutes, Section 48.185, the plaintiff Marquette has assessed charges in connection with its BankAmericard credit card program in reliance on such Statute as follows: a $10 annual charge for the privilege of using the card and, in addition, a finance charge equal to 1 percent per month (12 percent annual percentage rate). The finance charge of 1 percent per month assessed by plaintiff Marquette is computed on the average daily balance of the cardholder's account during each monthly billing cycle; except that where the account balance is attributable solely to purchases of goods and services charged to the account during one billing cycle, and the account is paid in full before the due date of the first statement issued after the end of that billing cycle, no finance charge is charged on that balance.

XII

The First National Bank of Omaha's BankAmericard program as conducted and operated in the manner described above, has resulted and will continue to result in competitive injury to The Marquette National Bank of Minneapolis and its BankAmericard program. The First National Bank of Omaha is able to offer the aforesaid BankAmericard program to Minnesota residents without a membership fee, and thereby induce customers away from Marquette, only because of the imposition and collection of finance charges of 1 1/2 percent per month from First National Bank of Omaha's BankAmericard holders in Minnesota.

CONCLUSIONS OF LAW

I

Nothing contained in the National Bank Act, 12 U.S.C. §85, precludes or preempts the application and enforcement of Minnesota Statutes, §48.185 to the First National Bank of Omaha's BankAmericard program as solicited and operated in the State of Minnesota.

II

The laws of the State of Minnesota, not the laws of the State of Nebraska, apply in determining the rate of interest permitted to be charged and collected by the First National Bank of Omaha from BankAmericard holders residing in the State of Minnesota.

III

The First National Bank of Omaha's BankAmericard program, as offered and operated in the State of Minnesota, is in violation of Minnesota Statutes, §48.185, in that it provides for the collection of a periodic rate of finance charge in excess of 1 percent per month.

IV

As agent of the First National Bank of Omaha in implementing said BankAmericard program and credit arrangement in the State of Minnesota, as the party that would enter into agreements with Minnesota merchants and Minnesota banks to participate in said BankAmericard program and credit arrangement, and by collecting interest from Minnesota residents under said BankAmericard program pursuant to assignments of delinquent accounts from the First National Bank of Omaha, defendant First of Omaha Service Corporation, in concert with the First National Bank of Omaha, has violated and threatens to continue to violate Minnesota Statutes, §48.185.

V

The Marquette National Bank of Minneapolis, as a bank extending credit in compliance with Minnesota Statutes, §48.185, which has and will be injured competitively by viola-

tions of this statute, is entitled to a permanent injunction prohibiting any continued violation of said statute.

ORDER FOR PARTIAL SUMMARY JUDGMENT

There being no genuine issue as to any material fact, the Court does hereby order that, pursuant to Rule 56 of the Minnesota Rules of Civil Procedure, judgment be entered in favor of The Marquette National Bank of Minneapolis and against defendant First of Omaha Service Corporation permanently enjoining defendant, First of Omaha Service Corporation, and all persons acting as officers, employees or agents thereof, from engaging in any solicitation of residents of the State of Minnesota or other activity in connection with the offering or operation of a bank credit card program in the State of Minnesota in violation of Minnesota Statutes, §48.185.

The Court expressly determines under Rule 54.02 of the Minnesota Rules of Civil Procedure that there is no just reason for delay for the entry of said judgment and that it be entered by the Clerk accordingly.

Dated: February 18th, 1977.

RICHARD J. KANTOROWICZ
Judge of District Court

MEMORANDUM

Plaintiff is a bank chartered under the National Banking Laws located in the State of Minnesota and brings this action for a permanent injunction restraining the defendants from soliciting BankAmericard customers in the State of Minnesota in violation of Minnesota Statutes 48.185. Defendant, First of Omaha Service Corporation, is the soliciting agent for the First National Bank of Omaha. Under the arrangement, the First of Omaha Service Corporation will merely solicit customers. The loans and credit will be extended by the First National Bank of Omaha. Because the First National Bank of

Omaha will not be soliciting customers in the State of Minnesota, they have not been joined as defendants at this stage of the proceedings.

Defendants are taking the position that First National Bank of Omaha, being chartered under the National Banking Act, enjoys all of the rights and privileges granted under that law and they may solicit business through its agents in Minnesota, offering interest rates which the First National Bank of Omaha could legally charge Minnesota residents.

The issue in this case is what is the legal rate of interest that the First National Bank of Omaha may charge Minnesota residents who subscribe to the BankAmericard plan offered by the First National Bank of Omaha.

The relevant provision of the National Banking Law is found in 12 U.S.C. §85.

> "Any association (national bank) may take, receive, reserve, and charge on any loan or discount made, or upon any notes, bills of exchange, or other evidences of debt, interest at the rate allowed by the laws of State, Territory, or District where the bank is located . . . and no more, except that where by the laws of any State a different rate is limited for Banks organized under State laws, the rate so limited shall be allowed for associations organized or existing in any such State under this chapter."

Under that provision of 12 U.S.C. §85, the United States Court, in 1873 (*Tiffany v. National Bank of Missouri*, 85 U.S. (18 Wall.) 409), evolved what became known as "most favored lender" doctrine. This doctrine provides that a national bank doing business in a state where it is not located may charge the highest rate of interest for that type of loan allowed by that state regardless of the type of lender. In other words,

even though the state banks in that state were limited; a national bank could charge a higher rate if an individual person could charge a higher rate. The "most favored lender" doctrine was subsequently embodied in a regulation issued by the Comptroller of Currency in 12 C.F.R. §7.7310.

> "CHARGING INTEREST AT RATES PERMITTED COMPETING INSTITUTIONS; CHARGING INTEREST TO CORPORATE BORROWERS.
>
> (a) A national bank may charge interest at the maximum rate permitted by State law to any competing State-chartered or licensed lending institution. If State law permits a higher interest rate on a specified class of loans, a national bank making such loans at such higher rate is subject only to the provisions of State law relating to such class of loans that are material to the determination of the interest rate. For example, a national bank may lawfully charge the highest rate permitted to be charged by a State-licensed small loan company or morris plan bank, without being so licensed.
>
> (b) A national bank located in a State the law of which denies the defense of usury to a corporate borrower may charge a corporate borrower any rate of interest agreed upon by such borrower."

Minnesota, by Minnesota Statute 48.185, has set up credit card loans as a separate loan entity and provides that a credit card customer may be charged a $15.00 annual service charge but shall not be charged a rate of interest in excess of 12% per annum (1% per month). The plaintiff in this case issues BankAmericard credit cards pursuant to a franchise it has with the National BankAmericard Company. However, it charges only a $10.00 fee as a one year service charge.

Defendants claim that under 12 U.S.C. §85, they are permitted to charge Minnesota residents the interest rate allowed by Nebraska Law, the state where First National Bank of Omaha is located. The Nebraska rate for credit card transactions would be 18% per annum or one and one half percent per month. Defendants propose to issue BankAmericards with no yearly service charge but will be charging a rate of interest higher than allowed by Minnesota Statutes regulating credit card loans.

This Court, on December 22, 1976, issued a Temporary Restraining Order, restraining defendants from soliciting or offering a bank credit card program in the State of Minnesota, in violation of Minnesota Statutes, Section 48.185. An application was made to the Minnesota Supreme Court by defendants and the Supreme Court denied them the relief they requested and ordered them to go back to the District Court for further proceedings. This matter was heard by the Court on January 7, 1977, on stipulated facts. It was further stipulated that this was to be a trial on the merits for a permanent injunction. Defendants rely on a number of arguments, some of which can be disposed of, without great discussion.

First of all, defendants argue that their interest rate is not higher than allowed under Minnesota Statutes because of the allowable $15.00 annual service charge. It is true that for customers who do not have very high credit card charges the $15.00 annual fee, when added as additional interest, makes it a higher rate. The interest rate at the low end of the scale would be higher. It is clear that defendants are not interested in small borrowers, however, and they are basically interested in the large users of credit cards and are more concerned with the large borrowers of money under the credits cards, and it is in this area that they would be violating the Minnesota

Statutes. The fact that they would be de facto in compliance at the lower end of the interest scale does not help them if they are in non-compliance at the high end of the interest scale. In fact, the Court's Order of December 22, 1976, has never prohibited defendants from soliciting credit card customers. It merely prohibited them from soliciting credit card customers in violation of Minnesota Statutes 48.185. So, if defendants are not soliciting customers, it's only because they intend to charge an interest rate greater than Minnesota law allows.

Defendants make great argument about the intelligence and education of consumers in our community and how, if they, in fact, charge a higher interest rate, they could not exist in a competitive market. This flies in the face of all known facts. It is common knowledge and well documented that consumers cannot make these judgments and there has been a plethora of consumer protection laws evidencing the fact that the government must protect the consumers from complicated business practices. Minnesota Statutes 48.185 is part of our consumer protection laws and the argument that consumers can protect themselves is an argument of long, long ago.

Since the founding of our republic, Congress, by its legislation, has allowed states to set their own interest rates. By their position in this case, the defendants are arguing that they have a right to export Nebraska's high interest rate into the State of Minnesota. This Court, in its Order of December 22, 1976, said:

> "To take a statute that has been on the books for almost 100 years and find in that law an intention, in 1976, to nullify a financial practice of 200 years standing is ludicrous and makes a mockery of the doctrine of legislative intent. If there be any intent in Congress it must be to preserve the financial customs of so long a standing in our Republic."

A long standing acquiescence in an interpretation of a law by the community is recognized as a powerful principal of statutory construction. See Sutherland Statutory Construction. §49.06.

> "The meaning which persons affected by an act and the public at large ascribe to it may nevertheless have an important bearing on how it should be construed.
>
> 'A practical construction given a statute by the public generally, as indicated by a uniform course of conduct over a considerable period of time, and acquiesced in and approved by a public official charged with the duty of enforcing the act, is entitled to great weight in the interpretation which should be given it, in case there is any ambiguity in its meaning serious enough to raise a reasonable doubt in any fair mind.' . . ."

Defendants are claiming by citing *Fisher v. First National Bank of Omaha*, Docket No. 75-1976 (8th Cir. January 28, 1977), and *Fisher v. First National Bank of Chicago*, 538 F.2d 1284 (7th Cir. 1976), that the two Circuit Courts of Appeals are, in fact, allowing National Banks to export their interest rates into low interest states. A reading of those two cases by this Court does not sustain that contention. It should be pointed out that in both of the Fisher Cases, the Courts were not dealing with a statute setting a credit card rate of interest but were applying small loan rate of interest of consumer loan rate of interest because there was no credit card rate of interest in any of the states involved. Therefore, the Court in neither of the Fisher Cases was faced with a specific "credit card interest" rate, but felt it had the choice of applying other interest rates that it deemed appropriate

to those situations. Because Minnesota has a credit card interest rate this creates a different situation because 12 C.F.R. 7.7310 identifies this as "such class of loans".

In both Fisher Cases and in all cases prior thereto, the courts have unanimously agreed that 12 U.S.C. 85 does not restrict national banks to state banking laws but no court has ever been faced with the proposition that we have here interpreting "such class of loans". Up until now the courts have had the freedom of defining credit card loans any way they wished, because no statute specifically provided for credit card loans. Now defendant argues that in the face of a credit card loan rate, it may still pick any rate it so desires. This, in fact, would negate all state usury laws. In effect, it would mean that national banks located in states with no usury laws could charge unlimited interest in any state of the United States. Such a position would seem to fly in the face of the Federal Regulation 12 C.F.R. 7.7310, which embodied the most favored lender rate where the national bank cannot be restricted to class of lenders, but by Federal Regulation are restricted to "class of loans".

It is agreed that 12 U.S.C. §85 was enacted to prevent states from discriminating against national banks. Therefore, states who create a different interest rate between classes of lenders would not be allowed to restrict national banks from enjoying the highest lending interest rates regardless of what class of lender was involved.

The need for such a division is obvious in that if states permitted high interest rates to certain persons in the state and denied them to national banks, national banks could not compete on equal footing and enjoy the parity that the courts have given them.

However, when the state makes laws limiting interest rates as to types of loans, it means that no one in that state can make that loan; therefore, the national bank is no better off or no worse off, than other people within the state.

This concept is embodied in C.F.R. 7.7310, which allows a state to forbid certain classes of loans. This is obviously fair because no one in the state can make such a loan and there is no discrimination against national banks. The national bank enjoys full parity with all other lenders in the state.

The same concept was approved in Fisher v. First National Bank of Omaha, 8th Circuit, January 28, 1977, when that case quotes with approval the language in *Union Missouri Bank of Kansas City v. Danforth*, 394 F.Supp. 774 (W.D. Mo. 1975):

> "Missouri has in effect made small loan companies licensed under that Chapter 'favored lenders' in the class of debt encompassed by the Retail Credit Sales Act. Plaintiffs, as national banks, are entitled to parity of interest charges with these lenders, notwithstanding the rates permitted to state chartered banks. To hold otherwise would be contrary to the congressional policy of assuring national banks parity with most favored state lenders and frustrate one of the primary objectives of the National Banking Act — competitive state-federal equality."

Heretofore, all of the decisions dealt with discrimination against classes of lenders. All of the cases cited by plaintiff forbid the same. However, the plain meaning of regulation 7.7310 indicates that states are allowed to discriminate as to classes of loans because everyone in the state is forbidden to make the loan and the principle of parity is not violated. Here, the State of Minnesota has set up a class of loan and designated it as a credit card rate. No one in the state is al-

lowed to issue credit at a more favorable rate; to allow First Bank of Omaha to charge a higher rate would violate the doctrine of parity.

The 8th Circuit Court in Fisher v. First Bank of Omaha interpreted Fisher v. First National Bank of Chicago to mean that the foreign national bank is limited with respect to the class of loans designation set by the state.

> "In the very recent case of Fisher v. First National Bank of Chicago, 538 F.2d 1284 (7th Cir. 1976), it was held that under the provisions of §85, if a national bank in one state makes a loan in another state in which it is doing business, and if there is a differential between the maximum rate allowable in one state and the maximum rate allowable in the other state with respect to *the same class of debt*, the bank may charge the higher of the two rates. (Emphasis supplied).
>
> We find ourselves in agreement with that holding. And when it is applied to this case, it is clear that the bank is entitled to charge on these transactions the highest permissible Nebraska rate for *the same class of loan* regardless of whether the loan is made in Nebraska or Iowa since the maximum rate allowable in Iowa is no higher than the maximum rate allowable in Nebraska. If Iowa permitted a higher rate, which it does not, the bank would be entitled to charge the higher rate. (Emphasis supplied.)

In summary, states may not discriminate between classes of lenders but may discriminate between classes of loans and because Minnesota has set a separate and distinct credit card rate, there is no loss of parity by requiring the defendants to comply with that law.

JUDGE RICHARD J. KANTOROWICZ

STATE OF MINNESOTA — DISTRICT COURT
County of Hennepin — Fourth Judicial District

726526

THE MARQUETTE NATIONAL BANK
OF MINNEAPOLIS,
Plaintiff,
and
WARREN SPANNAUS, ATTORNEY GENERAL,
STATE OF MINNESOTA,
Plaintiff-Intervenor,
Against
FIRST OF OMAHA SERVICE CORPORATION, and
CREDIT BUREAU OF ST. PAUL, INC.,
Defendants.

JUDGMENT

February 22, 1977

The above entitled action having been regularly placed upon the calendar of the above named Court for the September 1976 General Term thereof, came on for trial before the Court on the 7th day of January, and the Court, after hearing the evidence adduced at said trial and being fully advised in the premises, did, on the 18th day of February 1977, duly make and file its findings and order for judgment herein.

Now, pursuant to said order and on motion of John Troyer, Esq., Attorney for Plaintiff,

IT IS HEREBY ADJUDGED AND DECREED:

1. That nothing contained in the National Bank Act, 12 U.S.C. §85, precludes or preempts the application and enforcement of Minnesota Statutes, §48.185 to the First National

Bank of Omaha's BankAmericard program as solicited and operated in the State of Minnesota.

2. That the laws of the State of Minnesota, not the laws of the State of Nebraska, apply in determining the rate of interest permitted to be charged and collected by the First National Bank of Omaha from BankAmericard holders residing in the State of Minnesota.

3. That the First National Bank of Omaha's BankAmericard program, as offered and operated in the State of Minnesota, is in violation of Minnesota Statutes, §48.185, in that it provides for the collection of a periodic rate of finance charge in excess of 1 percent per month.

4. That as agent of the First National Bank of Omaha in implementing said BankAmericard program and credit arrangement in the State of Minnesota, as the party that would enter into agreements with Minnesota merchants and Minnesota banks to participate in said BankAmericard program and credit arrangement, and by collecting interest from Minnesota residents under said BankAmericard program pursuant to assignments of delinquent accounts from the First National Bank of Omaha, Defendant First of Omaha Service Corporation, in concert with the First National Bank of Omaha has violated and threatens to continue to violate Minnesota Statutes §48.185.

5. That the Marquette National Bank of Minneapolis, as a bank extending credit in compliance with Minnesota, Statutes, §48.185, which has and will be injured competitively by violations of this statute, is entitled to a permanent injunction prohibiting any continued violating of said statute.

6. That there being no genuine issue as to any material fact, the Court does hereby order that, pursuant to Rule 56 of the Minnesota Rules of Civil Procedure, judgment is hereby entered in favor of The Marquette National Bank of Minneapolis and against Defendant First of Omaha Service Corporation permanently enjoining Defendant, First of Omaha Service Corporation, and all persons acting as officers, employees or agents thereof, from engaging in any solicitation of residents of the State of Minnesota or other activity in connection with the offering or operation of a bank credit card program in the State of Minnesota in violation of Minnesota Statutes, §48.185.

7. That the Court expressly determines under Rule 54.02 of the Minnesota Rules of Civil Procedure that there is no just reason for delay for the entry of said judgment.

By the Court:
DISTRICT COURT
ADMINISTRATOR
By B. ARTHUR
Deputy

STATE OF MINNESOTA — DISTRICT COURT
County of Hennepin — Fourth Judicial District

Civil File No. 726526

THE MARQUETTE NATIONAL BANK
OF MINNEAPOLIS,
Plaintiff,

vs.

FIRST OF OMAHA SERVICE CORPORATION and
CREDIT BUREAU OF ST. PAUL, INC.,
Defendants.

NOTICE OF APPEAL

To: John Troyer and J. Patrick McDavitt, Attorneys for Plaintiff Marquette National Bank of Minneapolis, 520 Roanoke Building, Minneapolis, MN 55402, 339-0661

and

Roderick MacKenzie, Special Assistant Attorney General, representing the Intervenor State of Minnesota, 500 Metro Square Building, St. Paul, MN 55101, 296-6524

PLEASE TAKE NOTICE that the defendant First of Omaha Service Corporation appeals to the Supreme Court of the State of Minnesota from an order of the District Court dated February 18, 1977 and from the judgment entered thereon on February 22, 1977, in which the District Court granted partial summary judgment against this defendant and permanently enjoined this defendant from certain activity specified therein.

Dated: February 22, 1977.

MACKALL, CROUNSE & MOORE
By Clay R. Moore
1000 First National Bank Building
Minneapolis, Minnesota 55402
333-1341
Attorneys for Defendant First of Omaha Service Corporation

Of Counsel:
William Morrow and
Donald Buresh
SWARR, MAY, SMITH & ANDERSON
3535 Harney Street
Omaha, Nebraska 68131

STATE OF MINNESOTA
IN SUPREME COURT

THE MARQUETTE NATIONAL BANK OF MINNEAPOLIS,
Plaintiff-Respondent,

vs.

FIRST OF OMAHA SERVICE CORPORATION,
Defendant-Appellant,

and

STATE OF MINNESOTA,
Intervenor-Respondent.

APPELLANT'S MOTION FOR STAY

The appellant hereby moves the Court for its order, pursuant to Rule 108, Rules of Civil Appellate Procedure, as follows:

1) Staying the injunction issued by the district court and all proceedings thereon in the district court during the pendency of this appeal.

2) Adjudging that during the pendency of this appeal, the appellant First of Omaha Service Corporation may participate in a bank credit card program within the State of Minnesota in which finance charges on balances less than $1,000 may be assessed at the rate of 1 1/2% per month (18% per annum) and, on balances of $1,000 or more, at the rate of 1% per month (12% per annum).

3) Adjudging that during the pendency of this appeal, none of the acts of the appellant, or its principal The First National Bank of Omaha, or its agents or employees, in conformity with (2) above shall, at any time here-

after, be adjudged to be in contempt of the injunction from which this appeal is taken.

4) All of the above to be conditioned upon the filing of a supersedeas bond, or a deposit in lieu thereof, in the amount of $10,000, for the purposes set forth in Rule 108.01 (2), in the event the judgment appealed from herein is affirmed; said deposit to be returned to appellant upon application in the event the injunction appealed from herein is vacated by this Court.

This motion is based upon all of the files and records in this proceeding and upon the affidavit of Clay R. Moore attached.

Dated: February 28, 1977.

MACKALL, CROUNSE
& MOORE
By Clay R. Moore
1000 First National
Bank Building
Minneapolis, Minnesota 55402
(612) 333-1341
Attorneys for Appellant
First of Omaha Service
Corporation

Of Counsel:
William Morrow and
Donald Buresh
SWARR, MAY, SMITH
& ANDERSON
3555 Harney Street
Omaha, Nebraska 68131
(402) 341-5421

STATE OF MINNESOTA
IN SUMPREME COURT

THE MARQUETTE NATIONAL BANK
OF MINNEAPOLIS,
Plaintiff-Respondent,
vs.
FIRST OF OMAHA SERVICE CORPORATION,
Defendant-Appellant,
and
STATE OF MINNESOTA,
Intervenor-Respondent.

AFFIDAVIT OF CLAY R. MOORE

State of Minnesota
County of Hennepin—ss.

Clay R. Moore, Esq., being duly sworn on oath, deposes and says:

1) That he is one of the attorneys of record for the appellant First of Omaha Service Corporation and makes this affidavit in support of the attached Motion for Stay and based upon his personal knowledge of the proceedings in this case.

2) That, in affiant's judgment, the Supreme Court has the power, inherently and pursuant to Rule 108, to order and adjudge the relief sought in the attached motion and should do so, particularly in the light of the decision of January 28, 1977, of the U.S. Court of Appeals for the Eighth Circuit in *Fisher v. First National Bank of Omaha*, ——— F.2d ———.

3) That the district court, on December 22, 1976, as a condition of issuing the temporary restraining order herein

(later converted on February 18, 1977 to a permanent injunction) ordered the respondent Marquette, as a condition thereof, to post a bond of $10,000, over the objections of appellant as to its sufficiency.

4) If the anticipated damage to the appellant by reason of the temporary restraining order was considered by the district court and respondent to be $10,000, the bond requested herein to be posted by appellant as a condition of the relief sought herein cannot consistently be ordered to be more than $10,000.

Dated: February 28, 1977.

Clay R. Moore

Sworn and subscribed to before me this 28th day of February, 1977. — Mary A. McMillen, Notary Public, Hennepin County, Minnesota. My commission expires Sept. 16, 1983.

STATE OF MINNESOTA
IN SUPREME COURT

No. 47561

THE MARQUETTE NATIONAL
BANK OF MINNEAPOLIS,
Plaintiff-Respondent,

vs.

FIRST OF OMAHA SERVICE CORPORATION,
Defendant-Appellant,

and

STATE OF MINNESOTA,
Intervenor-Respondent.

RESPONSE IN OPPOSITION TO APPELLANT'S MOTION FOR STAY

Respondent makes the following response in opposition to appellant's motion to this Court for a stay of the permanent injunction entered in the District Court. Appellant's motion is inappropriate both precedurally and substantively.

Procedurally, a motion for stay pending appeal of a final judgment granting an injunction is one that should properly be made to the *District Court* under Rule 62.02 of the Minnesota Rules of Civil Procedure ("MRCP"):

> "When an appeal is taken from an interlocutory or final judgment granting, dissolving, or denying an injunction, the court in its discretion may suspend, modify, restore, or grant an injunction during the pendency of the appeal upon such terms as to bond or otherwise as it considers proper for the security of the rights of the adverse party."

Under the above rule, the District Court is given the discretion to decide whether or not to suspend a permanent injunction pending appeal by the enjoined party. The reason for the rule is that the trial court is considered to be in a better position, having heard the parties' respective positions at the trial court level as to the nature and extent of the controversy, to determine if such a stay is appropriate. *See,* Hetland and Adamson, *Minnesota Practice,* Rule 62.02, at p. 83.

Appellant has not addressed its motion for stay to the District Court, but rather, has attempted to use Rule 108 of the Minnesota Rules of Civil Appellate Procedure ("MRAP") for this purpose. This Court has held that MRCP Rule 62.02 controls over MRAP Rule 108 (formerly M.S.A. §605.11) and that the proper procedure in considering a stay of an injunction pending appeal is to bring such a motion before the District

Court in the first instance, subject to review by the Supreme Court when appropriate. *State, by Clark v. Robnan, Inc.*, 259 Minn. 88, 107 N.W. 2d 51 (1960). In addition, even if MRAP Rule 108 did control the appropriate procedure for requesting a stay of permanent injunction pending appeal, appellant has also ignored the provisions of Rule 108.01(1) requiring approval of the amount and form of supersedeas bond by the District Court.

Substantively, appellant's motion is also without merit. The District Court has entered its final order permanently enjoining defendant from engaging in any solicitation of Minnesota residents or other activity in connection with the offering or operation of a bank credit card program in this State in violation of Minnesota Statutes, §48.185. Having determined that said contemplated bank credit card program would be illegal in Minnesota if permitted to operate with an interest rate of 18 percent per annum, it would be incongruous for the Court to now permit appellant to proceed and violate Minnesota law pending the disposition of the appeal.

It is not unlike the situation present in the *Robnan* case cited above. There the trial court granted a temporary injunction restraining the defendant vendor from selling, offering for sale, or advertising any merchandise at less than cost in violation of Minnesota Statutes, §325.04. The defendant-appellant in that case, as here, claimed the state statute was invalid and sought to have the injunction stayed pending appeal to the Supreme Court on the issue of the Statute's validity. The trial court refused such a stay and the Supreme Court similarly denied appellant's motion for stay declining to interfere with the discretion exercised by the District Court. *State, by Clerk v. Robnan, Inc., supra*, 259 Minn. at 90.

Appellant implies that a recent federal court opinion (*Fisher v. First National Bank of Omaha*, —— F. 2d ——) discussing Iowa law has ruled on the issues presented here and, for that reason, a stay should be granted. That decision was, however, fully discussed by the District Court in its Memorandum accompanying its order for permanent injunction and found to be entirely inapplicable to the instant case. In any event, the issues presented here being one of the first impression in Minnesota, the District Court's decision stands unrefuted as stating the applicable law in this State and fully supports the continuation of the permanent injunction during the appeal period.

Finally, the appellant's motion for stay should be denied for the reason that it would bring about one of the very results that the District Court's injunction was designed to prevent, *i.e.* irreparable injury to the plaintiff-respondent by reason of defendant's violation of state law. The District Court specifically found that, to permit defendant to operate a bank credit card program at 18 percent per annum in violation of Minnesota Statutes, §48.185 would "result in competitive injury to The Marquette National Bank of Minneapolis and its BankAmericard program." *See*, District Court's *Findings of Fact*, Paragraph XII. A stay of the District Court's order would, in effect, permit appellant to engage in said illegal conduct during the pendency of the appeal to the irreparable detriment and injury of respondent.*

*There has been no such showing of irreparable harm to appellant if a stay is not granted. Indeed, as noted in the Response to Appellant's Motion for Expedited Appeal, appellant is in no way restrained from marketing its BankAmericard program in Minnesota as long as it does so in accordance with the interest rates permitted by Minnesota law.

Accordingly, respondent respectfully requests that appellant's motion for stay be denied.

Dated: March 1, 1977.

LEVITT, PALMER, BOWEN,
BEARMON & ROTMAN
By John Troyer
J. Patrick McDavitt
Attorneys for Plaintiff-Respondent The Marquette National Bank of Minneapolis
500 Roanoke Building
Minneapolis, Minnesota 55402
Telephone: 339-0661

STATE OF MINNESOTA
IN SUPREME COURT

THE MARQUETTE NATIONAL BANK OF MINNEAPOLIS,
Plaintiff-Respondent,
vs.
FIRST OF OMAHA SERVICE CORPORATION,
Defendant-Appellant,
vs.
THE STATE OF MINNESOTA, BY WARREN SPANNAUS, ITS ATTORNEY GENERAL,
Intervenor-Respondent.

RESPONDENT ATTORNEY GENERAL'S ANSWER IN OPPOSITION TO APPELLANT'S MOTION FOR STAY

The State of Minnesota, by its Attorney General, intervenor-respondent in this action, submits the following as its Answer In Opposition To Appellant's Motion For Stay.

Through its Motion For Stay, appellant is asking this Court to stay an injunction issued by the Hennepin County District Court enjoining appellant from offering its BankAmericard program in Minnesota at 18 percent per annum interest rates, rates which are clearly in violation of the express terms of Minn. Laws 1976, ch. 196, §5, upon the one condition that appellant file a supersedeas bond in the amount of $10,000 pursuant to Minn. R. Civ. App. P. 108.01(2).

The District Court heard extensive argument on the question of whether an injunction should issue in this case. The court found not only that appellant's interest rates are illegal under Minn. Laws 1976, ch. 196, §5, subd. 3, but also that appellant's BankAmericard program in Minnesota has caused respondent Marquette National Bank competitive injury. Given these findings, the court was clearly within its discretion in enjoining appellant under Minn. Laws 1976, §5, subd. 7 since that statute provides in part as follows:

> Any bank or savings bank extending credit in compliance with the provisions of this section, which is injured competitively by violations of this section by another bank or savings bank, may institute a civil action in the district court of this state against that bank or savings bank for an injunction prohibiting any violation of this section. The court, upon proper proof that the defendant has engaged in any practice in violation of this section, may enjoin the future commission of that practice. Proof of monetary damage or loss of profits shall not be required.

By granting a stay of this injunction now, the Supreme Court would essentially be reversing this determination on the merits made by the District Court. Such a result would not be in accord with the much more limited purpose of rule 108 which is to protect the rights of all parties during an appeal. A stay

here would drastically change the relative positions and rights of the parties during the appeal since it would permit appellant to engage in activity specifically denied it by the District Court. Such a radical change in the rights of the parties is not contemplated by rule 108.

Moreover, because of the nature of the State of Minnesota's interest herein, appellant simply cannot comply with rule 108.01(2). That rule provides as follows:

> If the appeal is from an order, the condition of the [supersedeas] bond shall be the payment of the costs of the appeal, the damages sustained by the respondent in consequence of the appeal, and the obedience and satisfaction of the order or judgment which the Supreme Court may give, if the appeal is dismissed.

There is absolutely no way in which the damages which would be sustained by the State as a result of a grant of a stay could be determined since the State's interest in preventing patent violations of its statutes cannot be measured, and since a continuing violation of Minn. Laws 1976, ch. 196, §5 will cause the State irreparable injury. A supersedeas bond cannot protect against this kind of injury. Thus, appellant cannot meet the requirements of rule 108(2) and should not be granted a stay thereunder.

For the foregoing reasons, the State of Minnesota, by its Attorney General respectfully requests that appellant's Motion For Stay be denied.

Dated: March 8, 1977.

WARREN SPANNAUS
Attorney General
RICHARD B. ALLYN
Solicitor General

THOMAS R. MUCK
Assistant Attorney General
STEPHEN SHAKMAN
Special Assistant Attorney General
RODERICK I. MACKENZIE
Special Assistant Attorney General
500 Metro Square Building
St. Paul, Minnesota 55101
Telephone: 612-296-6524

STATE OF MINNESOTA
IN SUPREME COURT

No. 47561

THE MARQUETTE NATIONAL BANK OF MINNEAPOLIS,
Plaintiff-Respondent,
vs.
FIRST OF OMAHA SERVICE CORPORATION,
Defendant-Appellant.

ORDER

Based upon all the files, records and proceedings herein,

IT IS HEREBY ORDERED that appellant's motion to stay all proceedings pending appeal be, and the same is, hereby denied; and

IT IS FURTHER ORDERED that the appeal be expedited and the matter be set for en banc hearing on April 6, 1977, at

9:30 A. M. Appellant's brief shall be served and filed within 3 days from the filing date of this order; respondent's brief shall be served and filed within 10 days thereafter and appellant shall have an additional 2 days to file its reply brief.

Dated: 3-18-77.

By the Court:
ROBERT J. SHERAN
Chief Justice

No. 250 Hennepin County

File No. 47561

Todd, J. Concurring specially, Sheran, C. J. Dissenting, Scott, J., Yetka, J., Wahl, J.

Endorsed
Filed November 10, 1977
John McCarthy, Clerk
Minnesota Supreme Court

THE MARQUETTE NATIONAL BANK OF MINNEAPOLIS,
Respondent,

vs.

FIRST OF OMAHA SERVICE CORPORATION,
Appellant,

and

STATE OF MINNESOTA,
Intervenor,
Respondent.

SYLLABUS

A national bank may charge its nonresident credit card customers an interest rate on unpaid accounts allowable in the state where it is located, or the interest rate of the state where it is doing business, whichever is higher.

Reversed.

Considered and decided by the court en banc.

OPINION

TODD, Justice.

The Marquette National Bank of Minneapolis (Marquette) sought to enjoin the First National Bank of Omaha (Omaha Bank) and its wholly-owned subsidiary, First of Omaha Service Corporation (Omaha Service) from issuing BankAmericard credit cards to the State of Minnesota. The Omaha Bank program assessed customers an annual interest rate of 18 percent on unpaid balances of less than $1,000, to be computed upon the prior month's balance of the individual account. The Minnesota Credit Card Act (Minn. St. 48.185)[1] sets a maximum interest rate of 12 percent per annum with the interest charge to be based on an amount no greater than the average balance of the individual account for the prior

---

[1] Minn. St. 48.185 provides in pertinent part: "Subd. 3. A bank or savings bank may collect a periodic rate of finance charge in connection with extensions of credit pursuant to this section, which rate does not exceed one percent per month computed on an amount no greater than the average daily balance of the account during each monthly billing cycle. If the billing cycle is other than monthly, the maximum finance charge for that billing cycle shall be that percentage which bears the same relation to one percent as the number of days in the billing cycle bears to 30.

"Subd. 4. No charges other than those provided for in subdivision 3 shall be made directly or indirectly for any credit extended under the authority of this section, except that there may be charged to the debtor:

"(a) Annual charges, not to exceed $15 per annum, payable in advance, for the privilege of using a bank credit card which entitled the debtor to purchase goods or services from merchants, under an arrangement pursuant to which the debts resulting from the purchases are paid or satisfied by the bank or savings bank and charged to the debtor's open end loan account with the bank or savings bank."

month. As a result of procedural actions, Omaha Service remains as the only defendant, but the matter was considered as though the Omaha Bank still remained as a defendant. The district court entered judgment permanently enjoining Omaha Service from soliciting BankAmericard customers on behalf of the Omaha Bank in Minnesota in contravention of the provisions of Minn. St. 48.185. We reverse.

Prior to the hearing on the matter, the parties agreed to a stipulation of facts which provides:

"I.

"The BankAmericard plan is a national and international bank credit card system which enables cardholders to purchase goods and services from participating merchants and obtain cash advances from participating banks throughout the United States and the world. The First National Bank of Omaha, which is not a defendant herein, is a national bank with its charter address in Omaha, Nebraska, is a card issuing member in the BankAmericard plan, and as such has issued (prior to the restraining order) and intends to issue * * * BankAmericard credit cards to Minnesota residents who qualify for them.

"II

"Defendant First of Omaha Service Corporation is a wholly-owned subsidiary of First National Bank of Omaha. Its principal place of business is in Omaha, Nebraska but it is authorized to transact business in the State of Minnesota and intends, unless restrained or enjoined, to transact business in the State of Minnesota in the manner set forth and described in Paragraph III of this Stipulation.

"III

"Defendant First of Omaha Service Corporation will participate in the system by entering into agreements with Minnesota merchants and Minnesota banks which will govern the participation of those merchants and banks in the system. * * * While participating Minnesota banks will not have the authority to issue cards or extend credit directly in connection with BankAmericard transactions, they will advertise the BankAmericard plan and solicit applications for BankAmericards from Minnesota residents which are then forwarded to First National Bank of Omaha for acceptance or rejection, and they will serve as a depository for BankAmericard sales drafts deposited by participating merchants with whom defendant First of Omaha Service Corporation has member agreements.

"IV

"The First National Bank of Omaha has solicited and intends to solicit Minnesota residents on a continuous and systematic basis, in order to induce them to enroll in the First National Bank of Omaha's BankAmericard program. This solicition program will be carried out by direct mail solicitation, telephone contact and through Minnesota banks. * * *

"V

"Minnesota cardholders wishing to purchase goods and services or obtain cash advances with a BankAmericard issued by the First National Bank of Omaha, sign a BankAmericard form evidencing the transaction which is authenticated by the cardholder's BankAmericard credit card, and exchange the signed form for goods or services or cash from a participating Minnesota merchant or bank,

respectively. The sales draft forms are then deposited by the participating Minnesota merchant to his account with a participating Minnesota bank for credit, which will then forward them and cash advance drafts drawn on such bank to the First National Bank of Omaha for credit.

"VI

"The First National Bank of Omaha renders periodic statements to its Minnesota cardholders and charges finance charges on the unpaid balance of the cardholder's account. Such finance charges are assessed at the rate of 1-1/2% per month on the first $999.99 of the customers account for an annual percentage rate of 18%, and 1% a month on amounts of $1,000 and more for an annual percentage rate of 12%. * * * [T]he finance charges assessed by the First National Bank of Omaha are computed on the daily outstanding balance of cash advances and on the entire previous balance of purchases of goods or services before deducting any payments made during the billing cycle. No finance charges are imposed on the purchases portion of the account balance when the previous month's total balance is paid in full on or before the due date shown on the monthly statement. Minnesota cardholders may pay all of their account balance in full or defer payment by paying an installment thereof. Payments of account balances are remitted by Minnesota residents directly to the First National Bank of Omaha.

"VII

"The defendant First of Omaha Service Corporation and participating Minnesota banks are or will be paid a fee for their services rendered to the First National Bank of Omaha. Defendant First of Omaha Service Corporation and the participating Minnesota banks do not directly

receive interest. However, the First of Omaha Service Corporation does accept assignments of delinquent accounts from the First National Bank of Omaha, and as an incident to collecting these accounts, does collect interest.

"VIII

"The defendant First of Omaha Service Corporation intends, unless further restrained or enjoined, to immediately commence solicitation of potential participating Minnesota banks and Minnesota merchants so that they may perform the functions described in Paragraph III and IV of this Stipulation in connection with the BankAmericard credit card program conducted by the First National Bank of Omaha. Interest rates will be assessed to Minnesota resident cardholders in the manner set forth in Paragraph VI of this Stipulation. Said interest rates are imposed by the First National Bank of Omaha in reliance on rates permitted in the State of Nebraska under Revised Statutes of Nebraska, 1943, and Cumulative Supplement, Secs. 8-815—8-823, 8-825—8-829, as added by Laws 1969, Chapter 31 (L.B. No. 52) as amended, and other laws of Nebraska, which the defendant First of Omaha Service Corporation contends are permitted to be charged to Minnesota residents by virtue of the provisions of the National Bank Act, Title 12 U.S.C. § 85.

"IX

"The plaintiff The Marquette National Bank of Minneapolis ('Marquette') is asking for temporary and permanent injunction restraining the defendant First of Omaha Service Corporation, and all persons acting as officers, employees or agents thereof, from engaging in any solici-

tation of residents of the State of Minnesota or other activity in connection with the offering or operation of a bank credit card program in the State of Minnesota in violation of Minnesota Statutes, Section 48.185.

"X

"Plaintiff Marquette is a national bank with its main banking office in Minneapolis, Minnesota, is a card-issuing member in the BankAmericard plan and as such has issued and continues to issue cards to Minnesota residents who qualify for them. * * *

"XI

"Since the enactment on April 8, 1976, of Chapter 196, Laws of Minnesota 1976, codified as Minnesota Statutes, Section 48.185, the plaintiff Marquette has assessed charges in connection with its BankAmericard credit card program in reliance on such Statute as follows: a $10 annual charge for the privilege of using the card and, in addition a finance charge equal to 1% per month (12% annual percentage rate). * * * [T]he finance charge of 1% per month assessed by plaintiff Marquette is computed on the average daily balance of the cardholder's amount during each monthly billing cycle, except that where the account balance is attributable solely to purchases of goods and services charged to the account during one billing cycle, and the amount is paid in full before the due date of the first statement issued after the end of that billing cycle, no finance charge is charged on that balance."

The procedural history of this case is significant. Marquette originally commenced an action in Minnesota district court against the Omaha Bank, Omaha Service and the Credit Bureau of St. Paul, Inc., alleging violations of the Minnesota

Credit Card Act (Minn. St. 48.185), and the Minnesota Deceptive Trade Practices Act (Minn. St. 325.772); and seeking money damages and injunctive relief to restrain the defendant from solicitation in Minnesota for defendant's BankAmericard program. Since the Omaha Bank was a national bank, the case was removed to the United States District Court for Minnesota pursuant to 28 USCA, § 1441. Marquette thereafter dismissed Omaha Bank as a party defendant, resulting in the case being remanded back to the state district court because of a lack of Federal subject matter jurisdiction.[2] The case then proceeded solely against Omaha Service. However, because Omaha Service's function is limited to entering into agreements with merchants and local banks, and, since it does not have control over the issuance of credit cards or establishing the rate of finance charge, the case was treated as if the Omaha Bank was still the defendant.

The district court issued a permanent injunction against Omaha Service prohibiting the "solicitation of residents of the State of Minnesota or other activity in connection with * * * the operation of a bank credit card program" which violates Minn. St. 48.185. In issuing the permanent injunction, the court held that while Federal law prevents states from enacting laws which discriminate against classes of lendors, it does not preclude states from discriminating against classes of loans. The principal issue presented on appeal is whether a state may regulate, by statute, the credit card interest rate charged by a national bank located in another state but conducting business within the regulating state.

---

[2] If Marquette had not dismissed the Omaha Bank as a party defendant, the case would have undoubtedly been transferred to the United States District Court for Nebraska since a national bank can only be sued in the forum where it is established. See, Radzanower v. Touche Ross & Co. 426 U. S. 148, 96 S. Ct. 1989, 48 L. ed. 2d 540 (1976).

National banks are regulated by the United States Congress. The amount of interest which a national bank may charge its customers is governed by 12 USCA, § 85, which provides in part:

> "Any association may take, receive, reserve, and charge on any loan or discount made, or upon any notes, bills of exchange, or other evidences of debt, *interest at the rate allowed by the laws of the State, Territory, or District where the bank is located.* * * *." (Italics supplied.)

The application of this section to interstate credit transactions has been recently considered by both the Seventh and Eighth Circuit Courts of Appeals. In Fisher v. First National Bank of Chicago, 538 F. 2d 1284 (7 Cir. 1976), certiorari denied, 429 U. S. 1062, 97 S. Ct. 786, 50 L. ed. 2d 778 (1977), the court addressed a situation in which a national banking association with its principal place of business in Illinois was charging Fisher, an Iowa resident, interest on the unpaid balance of his monthly BankAmericard statement at a rate allowable in Illinois. Fisher brought an action alleging that the Illinois bank was charging usurious interest to Iowa residents under its BankAmericard program. In permitting the Illinois bank to assess Illinois interest rates to Iowa resident users of the credit card, the court of appeals stated (538 F. 2d 1289):

> "* * * The defendant here is located, established and organized in only Chicago, Illinois, and is subject therefore to the rate of interest 'allowed by the laws of the State' of Illinois. If we could stop there and only look at the first portion of § 85, we could easily conclude that the 18% per annum rate of interest allowed by the Illinois Revolving Credit Act, Ill. Rev. Stat., ch. 74, § 4.2 (1973), governs the rate chargeable by the defendant within Illinois and anywhere else that it might do business. The language is certainly broad enough to bear that interpretation. It refers to the interest on 'any loan cr discount made' as being governed by the laws of the single state where the national bank can be located.
>
> "* * * The crux of this case is what law governs when the Chicago-located national banking association does business in another state, here Iowa. * * *
>
> * * * * *
>
> "We would summarize the statute as it applies to this case as follows: Illinois' 18% per annum statute applies to *all* loans made by the defendant Illinois national banking association, whether made in Illinois or elsewhere, but if the defendant is 'existing' in Iowa and if Iowa allowed, which it apparently does not, a rate of interest to its own state banks in excess of 18%, the defendant could charge such higher rate to the defendant's customers in Iowa."[3]

---

[3] But see, Meadow Brook National Bank v. Recile, 302 F. Supp. 62, 73 (E. D. La. 1969), in which the court reasoned: "In effect, 12 U.S.C. § 85 provides that a national bank may charge interest at the rate allowed by the laws of the state where the bank is located. The question is whether this was meant to fix the rate of interest on *all* loans made by the bank or merely those loans made in that state. Admittedly, the above quoted language would seem to include all loans made by the bank and not solely those made in the state where the bank is located. * * *

* * * * *

"We hold that 12 U.S.C. § 85 fixes the rate of interest chargeable by a national bank only as to loans made in the state where the bank is located; it does not fix the rate of interest which may be charged by a national bank which is located in one state and makes a loan in another state."

This reasoning was disapproved by the Seventh Circuit in Fisher v. First National Bank of Chicago, 538 F. 2d 1284, 1290 (7 Cir. 1976) certiorari denied, 429 U. S. 1062, 97 S. Ct. 786, 50 L. ed. 2d 778 (1977): "We are not inclined to so twist the plain meaning of the statute. It clearly states that the interest on 'any loan' is governed by the rate allowed by the state 'where the bank is located,' which in this case is Illinois."

After the action against the Illinois bank was in progress, the same plaintiff brought an almost identical action against the First National Bank of Omaha, challenging its right to charge Iowa resident customers of the Omaha BankAmericard program interest rates allowable in Nebraska. In Fisher v. First National Bank of Omaha, 548 F. 2d 255, 257 (8 Cir. 1977), the court of appeals, in denying the plaintiff's claim, stated:

> "* * * The question is whether under the National Bank Act we are required to apply the law of Nebraska or the law of Iowa to transactions which were initiated in Iowa but consummated in Nebraska.* * *
>
> "* * * We are persuaded, however, that it really makes no difference whether the transactions are characterized as being Nebraska transactions or whether they are characterized as Iowa transactions.
>
> "In the very recent case of *Fisher v. First Nat'l Bank of Chicago*, 538 F. 2d 1284 (7 Cir. 1976), it was held that under the provisions of § 85, if a national bank in one state makes a loan in another state in which it is doing business, and if there is a differential between the maximum rate allowable in one state and the maximum rate allowable in the other state with respect to the same class of debt, the bank may charge the higher of the two rates.
>
> "We find ourselves in agreement with that holding. And when it is applied to this case, it is clear that the bank is entitled to charge on these transactions the highest permissible Nebraska rate for the same class of loan regardless of whether the loan is made in Nebraska or Iowa since the maximum rate allowable in Iowa is no higher than the maximum rate allowable in Nebraska. If Iowa permitted a higher rate, which it does not, the bank would be entitled to charge the higher rate."

Thus, we have a situation where the Eighth Circuit Court of Appeals, which includes the State of Minnesota, has adopted with approval the view of the Seventh Circuit that a national bank can charge its credit customers an interest rate allowable in the state where it is physically located, or the interest rate of the state where it is doing business, whichever is higher. At this point, the procedural history of this case assumes a greater importance. It appears fairly obvious that if the Omaha Bank had remained as a party defendant, the Federal District Court for Minnesota or for Nebraska would have followed the opinion of the Eighth Circuit. By dismissing the Omaha Bank as a defendant, Marquette apparently intended to, and actually did, avoid a result that appeared to be predetermined if the case had remained in the Federal court system.

In reaching a decision to enjoin Omaha Service and, in practical effect, the Omaha Bank from operating their BankAmericard program in Minnesota in violation of § 48.185, the district court sought to distinguish the two Fisher cases. In a well-reasoned memorandum accompanying its order, the district court discussed and interpreted the Fisher cases in light of the factual situation of the present case and determined those cases to be inapplicable as there did not exist a statute setting a credit card rate of interest in any of the states involved. The court concluded that while 12 USCA, § 85, precludes states from discriminating against lendors as a class, it does not prohibit a state from establishing classes of loans which are applied uniformly to all banks doing business in the state. If we were writing on a clean slate, this reasoning would appear to be more consistent with the history and purpose of the National Bank Act.

The particular section of the National Bank Act under consideration in this case has been in existence for over a century. Obviously, the ramifications and problems resulting from bank credit card financing could not have been considered by Congress at the time of its adoption. Furthermore, a rather strong argument can be made that credit card financing is not purely banking business even though a bank may administer the program. The original version of the National Bank Act was enacted by Congress to protect national banks from discriminatory economic legislation by individual states in which the various national banks were located. The result of the Federal legislative efforts was to create what has commonly been referred to as a "most favored lendor status" for national banks. First National Bank in Mena v. Nowlin, 509 F. 2d 872, 879 (8 Cir. 1975); United Missouri Bank of Kansas v. Danforth, 394 F. Supp. 774, 779 (W. D. Mo. 1975). In the landmark case of Tiffany v. National Bank of Missouri, 85 U. S. (18 Wall.) 409, 21 L. ed. 862 (1874), the laws of Missouri limited the amount of interest chargeable by banks organized under state laws to 8 percent but allowed all other persons in the state to assess a 10-percent interest charge upon credit transactions. Within this statutory scheme a national banking association organized and located in the State of Missouri charged its credit customers a 9-percent interest rate which was alleged to be usurious. In an early interpretation of virtually identical statutory language to that employed in 12 USCA, § 85, the Supreme Court held that the National Bank of Missouri could lawfully charge its customers a 10-percent interest rate and reasoned (85 U. S. [18 Wall.] 412, 21 L. ed. 683):

> "* * * Coupled with the general spirit of the act, and of all the legislation respecting National banks, it is controlling. It cannot be doubted, in view of the purpose of

> Congress in providing for the organization of National banking associations, that it was intended to give them a firm footing in the different States where they might be located. It was expected they would come into competition with State banks, and it was intended to give them at least equal advantages in such competition. In order to accomplish this they were empowered to reserve interest at the same rates, whatever those rates might be, which were allowed to similar State institutions. This was considered indispensable to protect them against possible unfriendly State legislation. Obviously, if State statutes should allow to their banks of issue a rate of interest greater than the ordinary rate allowed to natural persons, National banking associations could not compete with them, unless allowed the same. On the other hand, if such associations were restricted to the rates allowed by the statutes of the State to banks which might be authorized by the State laws, unfriendly legislation might make their existence in the State impossible. A rate of interest might be prescribed so low that banking could not be carried on, except at a certain loss. The only mode of guarding against such contingencies was that which, we think, Congress adopted. It was to allow to National associations the rate allowed by the State to natural persons generally, and a higher rate, if State banks of issue were authorized to charge a higher rate. This construction accords with the purpose of Congress, and carries it out. It accords with the spirit of all the legislation of Congress. National banks have been National favorites. They were established for the purpose, in part, of providing a currency for the whole country, and in part to create a market for the loans of the General government.

It could not have been intended, therefore, to expose them to the hazard of unfriendly legislation by the States, or to ruinous competition with State banks."

The decisions reached in the Fisher cases injected a new attribute into the "most favored lendor status," which resulted in allowing the interstate shipment of interest rates by national banks in their credit card programs. This result is accomplished despite the fact that the individual state has attempted to specifically limit the interest rates allowable on certain loan transactions and its laws apply uniformly to all lending institutions within the state. Thus, by allowing a national bank to transport a given interest rate under these circumstances could afford it a distinct advantage in competing with state banking institutions, an advantage which appears to be contrary to the original purpose in adopting this particular section of the National Bank Act.

However, we deem it inappropriate for this court to permit the use of procedural devices to obtain a result inconsistent with the existing doctrine in the Eighth Circuit. Consequently, we must reverse the district court's order which enjoins Omaha Service from operating the Omaha Bank's BankAmericard program by charging an interest rate in violation of § 48.185. Consistent with the reasoning in the Fisher cases, the Omaha Bank may assess an interest rate to its BankAmericard customers in Minnesota which complies with the applicable Nebraska statutory interest rate. See, Neb. Rev. Stat. § 8-820.

Finally, we observe that under the present situation it is the responsibility of the United States Congress to resolve the obvious inequities created. A national bank engaged in the interstate business of credit card financing should not be able to avoid the provisions of Minnesota law relating to

allowable interest rates. The granting of a pecuniary advantage to the national banks seems inconsistent with the original purposes of the banking act and contrary to the expressed local interest of the state in protecting its citizens from excessive financing charges.

Reversed.

SHERAN, Chief Justice (concurring specially).

I agree with the result. I do not agree that the public suffers by application of the law in this case where users of credit cards now have a choice between competing suppliers.

SCOTT, Justice (dissenting).

I respectfully dissent. The original purpose of 12 USCA, § 85, of the National Bank Act was to prohibit states from discriminating against national banks in favor of local financial institutions. It was intended to put "national banks on an equal footing with the most favored lenders in the state without giving them an unconscionable and destructive advantage over all state lenders." First National Bank in Mena v. Nowlin, 509 F. 2d 872, 880 (8 Cir. 1975). Section 85 thus was intended to insure *intrastate* competitive equality among state lenders and national banks.

The Fisher decisions and the majority of this court interpret § 85 to apply in situations involving *interstate* transactions. These decisions and the majority would allow a credit card subsidiary of a Nebraska national bank to have rights greater than those enjoyed by national banks located in Minnesota. The shield of the Act has thus been turned into a sword which can [illegible] be used by national banks located outside Minnesota against local national banks. National banks located outside Minnesota would not only have most favored lender status in Minnesota but rights greater than the most

favored lender. Surely this result is not within the contemplation of the National Bank Act.

As the majority opinion states, "The decisions reached in the Fisher cases injected a new attribute into the 'most favored lender status,' which resulted in allowing the interstate shipment of interest rates by national banks in their credit card programs." Additionally, should a simple credit card transaction between a local citizen and a local merchant be construed as a bank loan by the Nebraska bank to a Minnesota citizen as Fisher proclaims without question? Minnesota should reject such an extension as a misinterpretation of the National Bank Act[1] and exercise its own judgment. In such matters we are not bound by the Federal circuit court cases but only by holdings of the United States Supreme Court.[2] E.g., United States ex rel. Lawrence v. Woods, 432 F. 2d 1072, 1076 (7 Cir. 1970).

I would therefore affirm the trial court's issuance of the permanent injunction against Omaha Service prohibiting the solicitation of credit card customers in Minnesota as a violation of Minn. St. 48-185.

YETKA, Justice (dissenting).

I join in the dissent of Mr. Justice Scott.

WAHL, Justice (dissenting).

I join in the dissent of Mr. Justice Scott.

---

[1] The trial court, in its order of December 22, 1976, stated: "To take a statute that has been on the books for almost 100 years and find in that law an intention, in 1976, to nullify a financial practice of 200 years standing is ludicrous and make a mockery of the doctrine of legislative intent. If there be any intent in Congress it must be to preserve the financial customs of so long a standing in our Republic."

[2] "While a decision of a federal court, other than the Supreme Court, may be persuasive in a state court on a federal matter, it is, nevertheless, not binding, since the state court owes obedience to only one federal court, namely the Supreme Court." 1B Moore, Federal Practice, Par. 0.402[1], p. 65 (2 ed.).

STATE OF MINNESOTA
OFFICE OF CLERK OF SUPREME COURT
ST. PAUL, MINN.

File No. 45761

THE MARQUETTE NATIONAL BANK
OF MINNEAPOLIS,

Respondent,

vs.

FIRST OF OMAHA SERVICE CORPORATION,

Appellant,

and

STATE OF MINNESOTA,
Intervenor,

Respondent.

November 21, 1977

SIR:

You will please take notice that on this date the following order was entered in the above entitled cause:

Application for reargument having been filed herein all further proceedings, except taxation of costs are stayed pending its determination.

Yours respectfully,
JOHN McCARTHY,
Clerk, Supreme Court

STATE OF MINNESOTA
IN SUPREME COURT

NO. 47561

THE MARQUETTE NATIONAL
BANK OF MINNEAPOLIS,

Respondent,

vs.

FIRST OF OMAHA SERVICE CORPORATION,

Appellant,

and

STATE OF MINNESOTA, INTERVENOR,

Respondent.

PETITION OF RESPONDENT FOR REHEARING

LEVITT, PALMER,
BOWEN, BEARMON
& ROTMAN
By John Troyer
J. Patrick McDavitt
500 Roanoke Building
Minneapolis, Minnesota
55402
612-339-0661
Attorneys for Respondent
The Marquette National
Bank of Minneapolis

MACKALL, CROUNSE
& MOORE
By Clay R. Moore
1000 First National
Bank Building
Minneapolis, Minnesota
55402
612-333-1341

WARREN SPANNAUS
Attorney General
By RICHARD ALLYN
Solicitor General
STEPHEN SHAKMAN
Ass't Attorney General
RODERICK I. MacKENZIE
Ass't Attorney General
500 Metro Square Building
St. Paul, Minnesota 55101
612-296-6524
Attorneys for Respondent
State of Minnesota

SWARR, MAY, SMITH
& ANDERSEN
By William R. Morrow, Jr.
Donald J. Buresh
3535 Harney Street
Omaha, Nebraska 68131
402-341-5421
Attorneys for Appellant
First of Omaha Service
Corporation

To The Honorable Justices of The Minnesota Supreme Court:

Respondent, The Marquette National Bank of Minneapolis ("Marquette"), respectfully petitions this Court for a rehearing en banc of its decision of November 10, 1977, in the above-entitled case.

In the majority opinion construing Minnesota Statutes, §48.185, et seq., in light of 12 U.S.C. §85, the Court held that a national bank may charge its non-resident credit card customers an interest rate on unpaid accounts allowable in the state where it is located, or the interest rate of the state where it is doing business, whichever is higher.

Respondent files this Petition for Rehearing on the following bases: (1) the exercise by Marquette of its procedural right on June 14, 1976 to dismiss its cause of action against the First National Bank of Omaha ("Omaha Bank") in order to avoid federal removal jurisdiction and the transfer by the United States District Court for Minnesota to the United States District Court for Nebraska was not done to avoid the decision of the United States Court of Appeals for the Eighth

Circuit in the case of *Fisher v. First National Bank of Omaha,* 548 F.2d 255, which was decided on January 28, 1977, (2) the majority has misread *Fisher v. First National Bank of Omaha, supra,* in that the adoption by the Eighth Circuit of the Seventh Circuit's construction of 12 U.S.C. §85 in *Fisher v. First National Bank of Chicago,* 538 F.2d 1284 (7th Circuit, 1976), is not central to the Eighth Circuit's holding and the Minnesota Supreme Court in construing 12 U.S.C. §85 is in effect writing on a "clean slate", and (3) if the decision of the majority of the Minnesota Supreme Court is permitted to stand, local Minnesota banks in conducting credit card programs in this state will be driven from the market place by out-of-state national bank competitors and once this happens, such out-of-state national banks will be free to raise their interest rates and Minnesota consumers will suffer as a result.

I

RESPONDENT IN DISMISSING ITS CLAIMS AGAINST THE FIRST NATIONAL BANK OF OMAHA IN ORDER TO AVOID FEDERAL REMOVAL JURISDICTION AND TRANSFER OF THIS MATTER TO THE FEDERAL DISTRICT COURT IN NEBRASKA EXERCISED ITS PROCEDURAL RIGHTS WITHOUT INTENT TO AVOID THE EIGHTH CIRCUIT'S DECISION IN FISHER V. FIRST NATIONAL BANK OF OMAHA, WHICH WAS HANDED DOWN ON JANUARY 28, 1977, MORE THAN SEVEN MONTHS LATER.

The majority of the Minnesota Supreme Court in rendering its decision relied heavily on the fact that Marquette dismissed its claims against the Omaha Bank in the above-entitled matter in order to avoid removal of the case to the United States District Court for Minnesota pursuant to 28 U.S.C. § 1441 and transfer of the case to the United States District Court for the District of Nebraska pursuant to 12 U.S.C. §94. The majority suggests that if Marquette had not dismissed the Omaha Bank as a party defendant, federal removal jurisdiction would have been obtained and the case would have been transferred to the United States District Court for the District of Nebraska, since a national bank can only be sued in the forum where it is established under 12 U.S.C. §94.

Judge Alsop in determining the removal question (422 F. Supp. 1346) found that Marquette was asserting a claim under state law, to-wit, Minnesota Statutes, §48.185, and that the Omaha Bank's defense that 12 U.S.C. §85 preempted state law did not convert Marquette's state law claim into a claim under federal statutes raising a federal law question and that, therefore, the U.S. District Court had no removal jurisdiction. Judge Alsop made it quite clear in his opinion that in considering federal removal jurisdiction, he considered the matter as if the Omaha Bank was still a party to the subject proceedings. Hence, Marquette's dismissal of its claims against the Omaha Bank on June 14, 1976, had no effect on Judge Alsop's decision on November 18, 1976, to remand the matter to Hennepin County District Court, State of Minnesota.

At the time Judge Alsop rendered his decision finding no federal removal jurisdiction and remanding the matter to the Minnesota State Court, the Eighth Circuit had not rendered its decision in *Fisher v. First National Bank of Omaha, supra.* This decision came down on January 28, 1977, *after* the Hennepin County District Court had issued its temporary restraining order (December 22, 1976); after the Minnesota Supreme Court had denied the Omaha Service Corporation's application for a writ of prohibition (December 31, 1976), and after a hearing on respondent's motion for a temporary and permanent injunction (January 7, 1977). On February 18, 1977, the

Hennepin County District Court, State of Minnesota, issued its permanent injunction enjoining First of Omaha Service Corporation from engaging in any bank credit card transactions in the State of Minnesota without first conforming its rate structure to Minnesota Statutes, §48.185. Thus, Judge Kantorowicz in issuing a permanent injunction had the benefit (or burden) of the Eighth Circuit's reasoning in that case.

To summarize, the following is a chronological list of the procedural history of the instant case leading up to the permanent injunction entered by the Hennepin County District Court:

May 14, 1976	Suit commenced.
June 10, 1976	Omaha Bank's Motion to Dismiss claiming proper venue was Douglas County, Nebraska.
June 11, 1976	Defendants' removal of case to Federal Court.
June 14, 1976	*Plaintiff's dismissal of Omaha Bank.*
June 18, 1976	*Plaintiff's Motion for Remand to State Court.*
November 18, 1976	Judge Alsop's Order Remanding case to State Court.
December 22, 1976	Temporary Restraining Order issued by Judge Kantorowicz.
December 31, 1976	Minnesota Supreme Court's Order Denying Defendant's Petition for Writ of Prohibition.
January 4, 1977	Plaintiff's Motion for Partial Summary Judgment or Temporary Injunction.
January 28, 1977	*Eighth Circuit's decision in Fisher.*
February 18, 1977	Permanent Injunction issued by Judge Kantorowicz.

In view of the foregoing, Marquette's motives in opposing removal of the action to the U.S. District Court for the State of Minnesota and transfer to the U.S. District Court for Nebraska, had nothing to do with the Eighth Circuit's decision in *Fisher v. First National Bank of Omaha, supra.* Since Marquette was asserting for the first time a state law claim under Minnesota Statutes, §48.185, it was preferred that a Minnesota court, rather than a Nebraska court, be given the first opportunity to construe such statute. Marquette preferred to get on with the merits of the litigation rather than have its cause of action bog down over a procedural hassle as to whether the courts in Minnesota or Nebraska had venue jurisdiction over the Omaha Bank under 12 U.S.C. §94 and, therefore, dismissed its claims against the Omaha Bank in order to avoid such procedural hassle.

The majority cites *Radzanower v. Touche, Ross & Co.*, 426 U.S. 148, 96 Supreme Court, 1989, 48 L.Ed.2d. 540 (1976), for the proposition that a Federal District Court sitting in Minnesota (or a state court, for that matter) would have transferred the case to the Federal District Court for Nebraska (or dismissed the action) under 12 U.S.C. §94, if respondent Marquette had not dismissed its claims against the Omaha Bank. However, there was no absolute certainty that transfer (or dismissal by a state court) would have occurred. The United States Supreme Court in *Radzanower v. Touche, Ross & Co.*,

supra, points out that a national bank, by its activities in a state other than the state were it is located, can waive its venue privilege under 12 U.S.C. §94. Because of respondent's election to dismiss its claims against the Omaha Bank, the question of venue jurisdiction over the Omaha Bank was never reached. However, it seems clear that the Omaha Bank as a result of its solicitation of Minnesota residents to enroll in the Omaha Bank's bank credit card program may well have waived its venue privilege and subjected itself to suit in the Federal District Court for the State of Minnesota or the Minnesota state courts. See *Citizens & Southern National Bank v. Bougas*, —— U.S. —— (Nov. 8, 1977), appended hereto; *Lapinsohn v. Lewis Charles, Inc.*, 212 Pa.Super. 185, 240 A.2d 90 (1968), cert. denied 393 U.S. 952 (1968).

Moreover, even if the Eighth Circuit decision in *Fisher v. First National Bank of Omaha, supra.*, had been in force and effect at the time Marquette first commenced this litigation, Marquette could have avoided the so-called "predetermined results" by suing the Omaha Bank in the Nebraska state courts. Marquette elected not to sue there because of the Minnesota state law question involved in this case. However, as Justice Scott points out, state courts are not bound by Federal Circuit Court cases but only by holdings of the United States Supreme Court and it is possible that a Nebraska state court judge, exercising independent judgment, would have distinguished the Fisher cases and ruled in favor of Marquette.

In view of the foregoing, the procedural history of this case is insignificant. Marquette in dismissing its claims against the Omaha Bank in no way sought to avoid a result that was otherwise "predetermined". It is respectfully submitted, therefore, that the Minnesota Supreme Court should not decide this case on the basis that because of the procedural history of the

case, it must necessarily defer to the Eighth Circuit's opinion rather than exercising independent judgment in this matter.

II.

THE EIGHTH CIRCUIT'S CITATION OF THE SEVENTH CIRCUIT'S OPINION IN FISHER V. FIRST NATIONAL BANK OF CHICAGO WAS NOT CRITICAL TO THE EIGHTH CIRCUIT'S DECISION.

Justices Yetka and Wahl joined with Justice Scott, who dissented, stating:

> "The Fisher decisions and the majority of this Court interpret §85 to apply in situations involving *interstate* transactions. These decisions and the majority would allow a credit card subsidiary of a Nebraska national bank to have rights greater than those enjoyed by national banks located in Minnesota. The shield of the Act has thus been turned into a sword which can now be used by national banks located outside Minnesota against local national banks. National banks located outside Minnesota would not only have most favored lender status in Minnesota, but rights greater than the most favored lender. Surely this result is not within the contemplation of the National Bank Act."

As Justice Scott points out in his dissenting opinion, state courts are not bound by federal circuit court cases but only by holdings of the United States Supreme Court and urges the majority to exercise independent judgment in the matter, rather than deferring to the Fisher decisions in the Eighth and Seventh Circuits because of use by Marquette of procedural devices to maintain the action in the Minnesota courts.

In *Fisher v. First National Bank of Chicago, supra.*, the Seventh Circuit affirmed the United States District Court for

the Northern District of Illinois, Eastern Division, which held:

> "Although §85 is silent as to the permissible rate of interest on loans made to borrowers situated in states other than where the national bank is located, this court feels that under such situations the permissible rate would be defined by the laws of the state in which the borrower is situated. However, a national bank making such a loan would retain its 'most favored lender' status within the parameters of that state's laws." (Document R-5, Respondent's Appendix).

The lower court had concluded that the Chicago bank could operate its bank credit card program in the State of Iowa under Iowa's Small Loan Act (as a most favored lender) and that under the Iowa Small Loan Act, it was permissible to charge a rate of 1-1/2% or 18% per annum.

The Court of Appeals for the Seventh Circuit in *Fisher v. First National Bank of Chicago, supra.*, agreed with the lower court's conclusion that a national bank operating outside the state of its charter or location has "favored lender status" and can charge in such state or states the highest rates permitted general lenders or special classes of lenders, such as small loan companies, so long as the bank making the loans confines itself in charging small loan interest rates to the making of small loans or similar kinds of loans.

In affirming the District Court's decision, the Seventh Circuit inexplicably chose not to apply, as the lower court did, a standard choice of law rule, i.e., determining the permissible interest rate as that defined by the laws of the state in which the borrower is situated, in the absence of any agreement between the parties. Restatement of Conflicts of Law, 2d, §188. While concurring in the result reached by the lower court, the

Seventh Circuit unnecessarily elected to construe 12 U.S.C. §85 as containing within itself a built-in "conflicts of law" provision and held that the language of 12 U.S.C. §85 permits a national bank to charge the highest rate of interest which it may charge in its home state or in the state where it is engaged in business, whichever is higher. The effect of such an interpretation is, of course, that a national bank in engaging in business in a state other than its home state may import from its home state (on a strained "most favored lender" theory) the highest rate of interest permitted to banks in the home state and apply that rate in making similar classes of loans in any foreign state. In over 100 years of scrutiny by bank counsel and the judiciary, this is the first time that such construction has ever been urged or given to that statute (at least from the standpoint of reported cases). The Seventh Circuit's finding that 12 U.S.C. §85 has built within it a "conflicts of law" provision must be deemed erroneous, given the legislative history of the statute. Moreover, it is highly unlikely that the Seventh Circuit fully understood the ramifications of such a holding, in that Fisher's counsel represented a class of individual consumers who claimed that the Illinois bank was engaging in usurious practices in Iowa, rather than banks, and was not particularly interested in making arguments seeking to protect the delicate balance of our dual (federal and state) banking system.

The lower court in the second Fisher case, *Fisher v. First National Bank of Omaha, supra.*, decided the usury question which Fisher raised in that case in favor of the Omaha Bank. The lower court reasoned that the parties had *agreed* that Nebraska law would apply to the transaction, the bank sales draft evidencing the cardholder's credit transaction was paid in Nebraska by the Omaha Bank, and remittance of payment

for the credit card account was made by the resident to the Omaha Bank in Nebraska. As a result of these contacts, the Nebraska Federal District Court Judge also applied standard "choice of law" rules and held that the Omaha Bank was entitled to charge in its bank credit card program in Iowa the highest rate permitted under Nebraska law on the theory that the credit card transactions initiated in Iowa were "consummated" in Nebraska.

On appeal, the Eighth Circuit Court of Appeals in *Fisher v. First National Bank of Omaha, supra.*, stated that it did not necessarily disagree with the lower court in finding that the bank credit card transactions were "consummated" in Nebraska. In its decision, the Eighth Circuit first compared the Nebraska and Iowa Small Loan Statutes and found that they had comparable rates. The Eighth Circuit then chose to rely upon the view of the Seventh Circuit that a national bank can charge its credit card customers an interest rate allowable in the state where it is located (chartered), or the interest rate of the state where it is doing business, whichever is higher, applied the "most favored lender" rule, and held as a consequence that the Nebraska Bank can charge in Iowa the small loan rates permitted in Nebraska or Iowa.

It is clear that the Eighth Circuit relied upon the similarity of the Small Loan Acts of the States of Nebraska and Iowa in its holding for the Eighth Circuit states:

> "* * * (It) is clear that the bank is entitled to charge on these transactions the highest permissible Nebraska rate for the same class of loan regardless of whether the loan is made in Nebraska or Iowa since the maximum rate allowable in Iowa is no higher than the maximum rate allowable in Nebraska. If Iowa permitted a higher rate, which it does not, the bank would be entitled to charge the higher rate."

It was *not* necessary for the Eighth Circuit to construe 12 U.S.C. §85 in reaching the result that it did in *Fisher v. First National Bank of Omaha, supra.* Standard "conflicts of law" rules provide that in the absence of choice of law by the parties or strong state policy as expressed in a state statute, the courts will normally uphold a credit transaction against the claim of usury, if the interest rate charged is permitted by the laws of the state of the lender or the borrower, whichever is higher. See Restatement of Conflicts of Law, 2d, §188. The Eighth Circuit to obtain the result which it reached had available to it the grounds that the parties, after all, agreed that Nebraska law would apply and that secondly, there was no express statute in Iowa dictating a choice of law rule for lenders who enter the state for the purpose of making loans to Iowa residents. It was entirely unnecessary for the Eighth Circuit, as it was unnecessary for the Seventh Circuit, to construe 12 U.S.C. §85 to reach the result which it did.

The Minnesota State Legislature in Minnesota Statutes, §48.185, Subd. 6 and 7, has expressed state policy by building into those statutory sections a provision that out-of-state lenders continuously and systematically soliciting Minnesota residents for the purposes of enrolling such residents in a bank credit card program, signing up Minnesota merchants and banks to honor the lender's credit cards and receiving remittances of payment from Minnesota residents, must conform their bank credit card rate structure to that dictated by Minnesota Statutes, §48.185. This choice of law rule in Minnesota Statutes, §48.185 is indeed the basis for a crucial distinction between the issues raised in this litigation and the issues raised in the Seventh and Eighth Circuit Fisher cases. In the Fisher cases, the Circuit Courts were not compelled to construe 12 U.S.C. §85 but could have reached the results which they did

solely on standard conflicts of law rules. The standard conflicts of law rule is that the parties to the transaction may first agree as to which state law is to be applied where the lender and the borrower are from separate states. In the absence of such agreement on in the absence of *compelling state interest to the contrary* (as expressed in the forum state's interest rate statutes), the tendency of courts is to uphold the credit transaction against the claim of usury if the interest rate charged complies with the laws of the state of the lender or the borrower. In the Fisher cases, neither Iowa, Nebraska nor Illinois had state laws reflecting a compelling state interest in the choice of law to be applied. Minnesota Statutes, §48.185, leaves no doubt in that respect. Therefore, 12 U.S.C. §85 must be construed and harmonized in light of Minnesota Statutes, §48.185.

Based on the foregoing, the Minnesota Supreme Court *is* writing on a "clean slate" and should exercise independent judgment in this matter, rather than relying on the Eighth Circuit and Seventh Circuit Court of Appeals decisions which are not only more limited in scope but fraught with *obiter dictum.* It is the solemn burden of the judiciary to harmonize, rather than find conflict between, federal and state law. It certainly is the province of the courts of this state to provide, at the very least, some independent judgment for their holding. The opinion of Judge Kantorowicz has given the Minnesota Supreme Court a basis for distinguishing the Fisher cases. The construction the appellant has given 12 U.S.C. §85, and adopted by the majority opinion herein, is dictated neither by reason, logic, legislative history, or the holdings of the Eighth and Seventh Circuits.

III

IF THE MAJORITY DECISION OF THE MINNESOTA SUPREME COURT IS PERMITTED TO STAND, LOCAL STATE AND NATIONAL BANKS IN THE STATE OF MINNESOTA WILL BE FORCED TO WITHDRAW THEIR BANK CREDIT CARD PROGRAMS LEAVING THE FIELD TO PREDATORY OUT-OF-STATE NATIONAL BANKS WHO WILL THEN BE FREE TO CHARGE EXORBITANT RATES OF INTEREST TO MINNESOTA CONSUMERS.

The Minnesota Supreme Court by construing 12 U.S.C. §85 to permit a national bank to charge the highest rate of interest permitted in the state where it is located or in the state where it is engaged in business, whichever is higher, has "twisted the plain meaning" of 12 U.S.C. §85 and has given out-of-state national banks a way of driving local state and national banks from the bank credit card field in the State of Minnesota.

Minnesota banks are compelled to impose a membership fee of $10 or $15 as well as a 12% interest rate, under Minnesota law, in order to make their bank credit card programs in this state profitable. Given the ruling of the Minnesota Supreme Court, out-of-state national banks located in states which permit higher interest rates (or have no interest rate limitations whatsoever) are now able to operate in the State of Minnesota by offering the bank credit card free and imposing an interest rate of 18% per annum or higher. It is a foregone conclusion that the bank credit card customer prefers not to pay a membership fee for his credit card, whatever the interest rate may be. However, the decision of the Minnesota Supreme Court will permit out-of-state national banks, as a predatory practice designed to force local bank competitors from the field,

to come into the State of Minnesota and for a limited time (long enough to drive out competitors) to charge the Minnesota rate of 12% without a membership fee. Such action will destroy the entire cardholder base of any Minnesota bank operating under Minnesota law. Once local Minnesota banks are forced out of the bank credit card market, the out-of-state national banks will be permitted to raise their interest rate charges to 18% or beyond depending upon the law of the state where the national bank is located. In point of fact, a national bank located in a state without interest rate limits will be permitted to charge in Minnesota whatever the market will bear. Without competition from local state and national banks, there is no limit on those rates.

The majority of the Minnesota Supreme Court, in its decision, has now said to the Minnesota Legislature that insofar as out-of-state national banks are concerned, the State of Minnesota is powerless to adopt legislation which will limit the interest rate which such banks may charge when they elect to come into Minnesota and systematically and continuously solicit Minnesota residents. As a corollary, the Minnesota Legislature has been told that it is apparently powerless to prevent state legislatures of other states from dictating the interest rates which Minnesota residents shall pay in credit transactions.

The suggestion that, although the result in this case is unfair, it is up to Congress to resolve the problem, is not helpful. Interest rates are peculiarly a matter of local state law and Congress is not apt to take action until the problem has reached nationwide proportions. By that time, the ability of the Minnesota banks to compete with out-of-state banks will have been irreparably impaired.

In view of the foregoing, we respectfully request that the Supreme Court of the State of Minnesota grant Respondent's Petition for Rehearing and affirm the trial court's decision below.

Dated: Nov. 21, 1977.

LEVITT, PALMER, BOWEN,
BEARMON & ROTMAN
By John Troyer
J. Patrick McDavitt
Attorneys for Respondent
The Marquette National
Bank of Minneapolis
500 Roanoke Building
Minneapolis, Minnesota 55402
Telephone (612) 339-0661

STATE OF MINNESOTA
IN SUPREME COURT

NO. 47561

THE MARQUETTE NATIONAL
BANK OF MINNEAPOLIS,

Respondent,

vs.

FIRST OF OMAHA SERVICE CORPORATION,

Appellant,

and

STATE OF MINNESOTA, INTERVENOR,

Respondent.

REPLY OF APPELLANT TO PETITION FOR REHEARING

MACKALL, CROUNSE & MOORE
By Clay R. Moore
1000 First National Bank Building
Minneapolis, Minnesota 55402
Phone: (612) 333-1341
and
SWARR, MAY, SMITH & ANDERSON
By William E. Morrow, Jr. and Donald J. Buresh
3535 Harney Street
Omaha, Nebraska 68131
Phone: (402) 341-4521
Attorneys for Appellant First of Omaha Service Corporation

LEVITT, PALMER, BOWEN, BEARMON & ROTMAN
By John Troyer
J. Patrick McDavitt
500 Roanoke Building
Minneapolis, Minnesota 55402
Phone: (612) 339-0661
Attorneys for Respondent The Marquette National Bank of Minneapolis
WARREN SPANNAUS
Attorney General
By RICHARD ALLYN
Solicitor General
STEPHEN SHAKMAN
Assistant Attorney General
RODERICK I. MacKENZIE
Assistant Attorney General
500 Metro Square Building
St. Paul, Minnesota 55101
Phone: (612) 296-6524
Attorneys for Respondent State of Minnesota

APPELLANT'S REPLY TO PETITION FOR REHEARING

Respondent's petition is based on three assertions, none of which involve matters which the Court "overlooked, failed to consider, misapplied, or misconceived within the meaning of Rule 140, Rules of Civ. App. Proc. Indeed the presence of three dissents and a concurring opinion by the Chief Justice indicate the case received an unusually intense and thorough consideration.

I

PROCEDURAL HISTORY

Respondent asserts that the Court gave undue weight to the procedural history of this case, claiming that U.S. District Judge Alsop's decision to remand, 422 F.Supp. 1346, was not affected by the dismissal of the Omaha Bank as a defendant when the case was in the Federal District Court (Petition, p. 4). This argument is made in response to the Court's observation (Opinion, p. 11) that it would be inappropriate to permit the use of procedural devices to obtain a substantive result inconsistent with that which would have been achieved in the federal court system in Minnesota.

First, it is clear that, even if the particular procedural history of this case is ignored, a contrary decision by this Court would have produced an unfortunate and unseemly conflict between the state courts of Minnesota and the U.S. District Court in Minnesota. The Minnesota Federal District Court would be obligated to adhere to the decision of its superior appellate court in *Fisher v. First National Bank of Omaha*, 548 F.2d 255 (8 Cir. 1977). If this Court had reached a result contrary to the *Fisher* case, *supra*, thus binding the lower state courts in Minnesota, the substantive rights of a national bank would have become dependent upon which court system obtained jurisdiction in any future case; more to the point, the

substantive rights of a national bank would be dictated by whichever litigant was sufficiently swift or artful to avoid the jurisdiction of whichever court system adhered to a view contrary to its interest. We interpret the Supreme Court's references to the actual procedural history of the case to be merely illustrative of the need to avoid creating an intrastate conflict between the two court systems on matters of federal substantive law.

Moreover, respondent is demonstrably in error when it asserts that the dismissal of the Omaha Bank as a defendant made no difference to Judge Alsop. Judge Alsop took the view that dismissal of the Omaha Bank was critical because, as he stated:

> "Because the claim against the Omaha Bank is the only one which arguably arises under the laws of the United States, there is no longer any claim arising under federal law before the Court." 422 F.Supp. at 1354.

He went on to say:

> "It appears to this Court inappropriate to retain jurisdiction 'where the federal head of jurisdiction [to wit: the Omaha Bank] has vanished from the case and there has been no substantial commitment of judicial resources to the non-federal claims'." 422 F.Supp. at 1354.

As it developed, Judge Alsop was in error when he stated that the question of the application and meaning of federal law, 12 U.S.C. §85, disappeared with the dismissal of the Omaha Bank. He undoubtedly believed that, since federal law clearly preempted state law, the respondent Marquette would only pursue other unrelated state law claims upon remand. As it turned out, the nature of the case did not change upon remand although Judge Alsop cannot be faulted for his contrary prediction. In any event, the continued presence of the

Omaha Bank in the case would have severely jeopardized the respondent's efforts to keep the case in the state court and, as this Court observed, to avoid a change of venue to the federal court in Omaha (Opinion, Footnote 3).

It may well be that respondent Marquette was not seeking to avoid the 8th Circuit decision in *Fisher*, which was not decided until January, 1977; however, respondent was obviously maneuvering to avoid the federal courts. Respondent originally joined the Omaha Bank as a defendant in the state court; no good reason appears for the respondent's voluntary dismissal of the Omaha Bank other than as a part of a successful effort to defeat federal court jurisdiction. The success of this maneuver can be seen in the fact that if the case had remained in federal court, the Omaha Bank's credit card program would have been permitted to proceed in Minnesota by January 27, 1977, at the latest (the date of the 8th Circuit decision), and probably much sooner in view of the 7th Circuit *Fisher* decision rendered on July 29, 1976, 538 F.2d 1284. The federal district courts in one circuit are bound to give particular weight to decisions of another circuit's Court of Appeals in the absence of a controlling precedent in the home circuit. *Gustafson v. Wolferman*, 73 F.Supp. 186 (W.D. Mo. 1947); *Burton v. U.S.*, 139 F.Supp. 121 (D.Utah); 32 Am.Jur. 2d §415. The respondent Marquette's dismissal of the Omaha Bank was not only critical to Judge Alsop's decision, but was prompted by the Marquette's fear that the federal court system would be far more receptive to the argument that 12 U.S.C. §85 preempted the operation of any state law purporting to govern the interest rates of national banks. This fear had a sound basis in several decades of federal court decisions and, as it turned out, was well grounded as to the precise issue presented here. The dismissal of the Omaha Bank was, therefore, no in-

nocent afterthought but was a tactical maneuver designed to avoid a feared predetermined substantive result.

Finally, the respondent Marquette claims that this Court abandoned its duty to render an independent decision on the merits (Petition, p. 7); this contention is untrue and unfair to the Court. As we read the Court's opinion, the Court properly felt that it could not leave an important legal right dependent upon which court system in Minnesota was able to obtain jurisdiction. The Court exercised the highest degree of judicial responsibility.

II
THE 8TH CIRCUIT FISHER OPINION

The respondent argues that the 8th Circuit did not need to construe 12 U.S.C. §85 in reaching its result nor did it need to rely upon the 7th Circuit *Fisher* opinion. Respondent contends that the 8th Circuit opinion could have been based on ordinary choice of law principles.

We fail to understand the purpose of the argument. The fact is that the 8th Circuit *did* construe 12 U.S.C. §85 and made it clear that "choice of law" issues, i.e. whether the loan was "made" in Iowa or Nebraska, were immaterial. See 548 F.2d at 257. The 8th Circuit could hardly have avoided the issue since the plaintiff Fisher's primary cause of action was a claim of usury in violation of the National Bank Act, 12 U.S.C. §85, 548 F.2d at 256. Whether the Court of Appeals could have ducked the issue is of no importance; the Court properly performed its duty to render an interpretation of 12 U.S.C. §85. The respondent's suggestion that this interpretation was obiter dictum is manifestly absurd.

The respondent's contention that Minnesota Statutes §48.185 reflects a compelling state interest which should result in a contrary interpretation of 12 U.S.C. §85 misses the

point. Federal law in this area *preempts* state law no matter how "compelling" that state law is made to appear. The state legislature cannot alter the meaning of a federal preemptive statute by any state law, no matter how it is worded.

Moreover, there is no grounds for asserting that the state laws of Iowa, Illinois or Nebraska, involved in the *Fisher* cases, reflected any less of a state interest than does Minn. Stat. §48.185; the interests of the consumer in the Fisher cases could hardly be less compelling than the interests of the respondent Marquette which seeks in this litigation merely to avoid competition by use of §48.185.

III
COMPETITIVE AFFECT OF DECISION

The respondent envisages that this Court's decision will permit out-of-state national banks to drive the respondent and other domestic national banks out of business. The argument is based upon the false premise that Minnesota's national banks are compelled to charge 12% plus a \$10.00 or \$15.00 annual fee. (Petition, p. 15)

We have already pointed out in the appellant's brief that the Omaha Bank's 18% annualized rate with *no* annual fee costs less for most persons than the Marquette's 12% plus \$10.00 annual fee or the 12% plus \$15.00 provided in Minn. Stat. §48.185. This is so because bank credit card unpaid balances tend to be relatively low for at least two reasons: card holders tend to keep these balances low by taking advantage of the 30-day grace period so as to avoid the imposition of finance charges, and bank credit cards are not designed or used for large transactions on a continual month-by-month basis.

For most people, the Omaha Bank credit card is a more attractive proposition. However, as the unpaid balances increase, the Marquette's credit card becomes more attractive because

the $10.00 annual fee has a progressively less percentage impact. For the higher balance customers, the Marquette has, at the present, a competitive edge pricewise.

The Marquette and other domestic national banks also have the distinct competition advantage of being located in Minnesota, each with a vast number of customers accumulated over the years to which these local banks are able to provide a full range of banking services apart from their credit cards. The Omaha Bank cannot match this advantage.

Moreover, the Minnesota national banks are not compelled to maintain their charges at 12% plus $10.00 or $15.00. The local banks are quite free to lower either the finance charge itself or the annual fee, or both, so as to bring the effective cost of their credit cards to a level which is equal to or below that of the Omaha Bank. Or, if the local banks feel that charging an annual fee is a competitive disadvantage, they can structure their rates under the Minnesota Small Loan Act, Minn. Stat. Chapter 56, so as to charge a higher interest rate and eliminate the annual fee. This is one of the options clearly available under 12 U.S.C. §85. *Fisher v. First National Bank of Omaha, supra* (8th Cir. 1977); *Northway Lanes v. Hackley Union National Bank*, 464 F.2d 855 (6th Cir. 1972); *Partain v. First National Bank of Montgomery*, 467 F.2d 167 (5 Cir. 1972).

The Marquette has not been joined in this case by any other Minnesota based national banks. Those other banks apparently do not see themselves driven from the marketplace by this Court's decision, or being placed in an untenable competitive posture. The Marquette simply does not like price competition, which occurs all to infrequently in the field of consumer finance. One of the key elements in the Marquette's successful lobbying of Minn. Stat. §48.185 was not merely the lucrative

yield afforded by the 12% plus $15.00 price structure but also Subd. 7 of that Statute which ostensibly gave the Marquette, as a "competitively injured" bank, the standing to seek to enjoin an out-of-state bank which structured its rates so as to eliminate the need for an annual fee. Subd. 7 represents an effort to prevent the public from having this choice of rate structures and to eliminate or severely restrict the opportunity for price competition.

The spectre of an out-of-state national bank entering Minnesota at a predatory rate and then, having destroyed its competition, raising its rates to some unconscionable level is more a product of Marquette's counsel's imagination than it is of economic or legal reality. Such a scenario has no application to the Omaha Bank. Moreover, no bank would be willing to suffer the losses it must first withstand when it knows that other national banks can quickly re-enter the Minnesota market at competitive rate levels thus preventing the "predator" from enjoying the rewards of its temporary hold on the market. The ability of such banks to move rapidly into Minnesota is amply demonstrated by the events following the passage of Minn. Stat. §48.185 in which several new bank credit card programs popped up almost overnight, both domestic and out-of-state.

The threat of "importation" of rates from a state having no interest rate limitation is no threat at all; there are no such states and, even if there were, 12 U.S.C. §85 provides the very unattractive alternative of compelling such a bank to charge 7% simple interest or 1% in excess of the 90-day discount rate (unless, of course, such a bank chooses to structure its rates under Minnesota law).

We recognize that Justice Todd, writing for the majority, felt that 12 U.S.C. §85 produces "obvious inequities". We do

not agree that, as a practical matter, the federal statute creates inequities from the standpoint of the consumer; in the present case the result is to permit the consumer to have available a credit card which costs most people less money. The effect of 12 U.S.C. §85 upon local national banks is to place them in a position in which they will have to respond to the realities of effective price competition—a response which they are fully capable of making within the broad authority granted by 12 U.S.C. §85. We do not perceive it to be inequitable to require the Marquette to participate in a more competitive market.

The majority opinion nevertheless properly recognizes that the matter is one for Congress to determine, not the courts. Contrary to respondent's claim, the interest rates of national banks are not a matter of "local state law" (Petition, p. 16) but, in our federal system, are solely within the control of the federal Congress.

We submit that the Petition for Rehearing should be denied.

MACKALL, CROUNSE
& MOORE
By Clay R. Moore
1000 First National
Bank Building
Minneapolis, Minnesota 55402
Phone: (612) 333-1341

STATE OF MINNESOTA
IN SUPREME COURT

THE MARQUETTE NATIONAL
BANK OF MINNEAPOLIS,
Respondent,

vs.

FIRST OF OMAHA SERVICE CORPORATION,
Appellant,

and

STATE OF MINNESOTA, INTERVENOR,
Respondent.

No. 47561

ORDER

Based upon all the files, records, and proceedings herein, IT IS HEREBY ORDERED that

1. The petition of respondent Marquette National Bank of Minneapolis for rehearing is denied.

2. The original opinion is amended by deleting therefrom the following language appearing on page 8 of the court's opinion, to-wit:

"By dismissing the Omaha Bank as a defendant, Marquette apparently intended to, and actually did, avoid a result that appeared to be predetermined if the case had remained in the Federal court system."

3. Respondent Marquette National Bank is herewith granted a stay of judgment pending application for writ of certiorari to the United States Supreme Court. The stay is conditioned upon the filing of a bond in the amount of $10,-000 with this court, approved by one of the justices of this

court. The stay is further conditioned that if Marquette National Bank fails to make application for writ of certiorari with the United States Supreme Court within the time period allotted therefor or fails to obtain an order granting its application or fails to make its plea good in the United States Supreme Court, it shall answer for all damages and costs which the appellant First of Omaha Service Corporation may sustain by reason of the stay.

Dated: December 8, 1977.

By the Court

Associate Justice

STATE OF MINNESOTA,
SUPREME COURT

No. 47561

THE MARQUETTE NATIONAL
BANK OF MINNEAPOLIS,

Respondent,

vs.

FIRST OF OMAHA SERVICE CORPORATION,

Appellant,

and

STATE OF MINNESOTA, INTERVENOR,

Respondent.

Pursuant to an order of Court heretofore duly made and entered in this cause it is determined and adjudged that the order and judgment of the Court below, herein appealed from, to-wit, of the District Court within and for the County of Hennepin be and the same hereby is in all things reversed.

And it is further determined and adjudged that appellant herein, do have and recover of respondent The Marquette National Bank of Minneapolis herein the sum and amount of Ninety-Four and no/100 .... DOLLARS, ($94.00) and disbursements in this cause in this Court, and that execution may be issued for the enforcement thereof.

Dated and signed December 14, 1977.

By the Court

Attest: JOHN McCARTHY
Clerk

STATEMENT FOR JUDGMENT

Statutory Costs $25.00
Return $5.00
Printer $44.00
Postage and Express $
Clerk $20.00
Appeal Bond $
Acknowledgments $
Transcript $
Total $94.00

Satisfaction of Judgment filed before the above judgment is duly satisfied in full and discharged of record.

State of Minnesota
Supreme Court—ss.

I, John McCarthy, Clerk of said Supreme Court, do hereby state that foregoing is a full and true copy of the Entry of Judgment in the cause therein entitled, as appears the original remaining of record in my office; that I have carefully compared the within copy with said original the same is a correct transcript therefrom.

Witness my hand and seal of said Supreme Court at the Capitol, in the City of St. Paul March 7, 1978.

JOHN McCARTHY
Clerk
By WAYNE TSCHIMPERLE
Deputy

STATE OF MINNESOTA
IN SUPREME COURT

NO. 47561

THE MARQUETTE NATIONAL
BANK OF MINNEAPOLIS,
Respondent,

vs.

FIRST OF OMAHA SERVICE CORPORATION,
Appellant,

and

STATE OF MINNESOTA,
Intervenor
Respondent.

Appellant's Motion to Vacate Stay

The appellant First of Omaha Service Corporation moves the Court for its order vacating the stay of judgment contained in paragraph 3 of its Order of December 8, 1977 (see copy attached) on the grounds that respondent Marquette National Bank has failed to make timely application for a writ of certiorari with the United States Supreme Court and has, thereby, failed to comply with the conditions of said stay.

Facts and Argument

On November 10, 1977, this Court rendered its decision that a Nebraska national bank was entitled under 12 U.S.C. §85 to charge interest rates on bank credit cards in accordance with either the laws of its home state or the state in which it was doing business. In so ruling, this Court reversed the judgment of the district court which had granted a permanent injunction which compelled compliance with the credit card rate structure set forth in Minn. Stat. §48.185.

On December 8, 1977, this Court denied the respondent Marquette's petition for rehearing but, at the same time, stayed its judgment until the respondent Marquette could seek, and have disposed of, a writ of certiorari in the United States Supreme Court. The stay was expressly conditioned on a timely application for certiorari.

The period of time allowed for filing a petition for writ of certiorari is 90 days. See 28 U.S.C. §2101(c). The 90 day period ended on March 8, 1978 and, on that date, no petition for a writ had been received by undersigned appellant's counsel nor had such a petition been filed with the United States Supreme Court (this has been verified by the clerk of that Court).

In those cases where a petition for rehearing in the lower court has been filed (as here) the time for filing a petition for a writ of certiorari begins on the date of the decision denying the petition—December 8, 1977, in this case.

In *Citizens Bank of Michigan City v. Opperman*, 249 U.S. 448, 63 L.Ed. 701, 39 S.Ct. 330 (1919) the Court stated:

> "Where a petition for rehearing is entertained, the judgment does not become final for purposes of our review until such petition has been denied or otherwise disposed of, and the three months limitation [for certiorari] begins to run from date of such denial or other disposition." 249 U.S. at 450, 63 L.Ed. at 702.

And, in *U.S. v. Adams*, 383 U.S. 39, 15 L.Ed.2d 572, 86 S.Ct. 708 (1966) in footnote 1, the Court referred to a motion to amend a judgment, comparable to a petition for rehearing. It said:

> "[W]here a timely motion is filed, the time [for certiorari] in such cases runs from the date of the order overruling the motion." 383 U.S. at 41, fn. 1, 15 L.Ed.2d at 574, fn. 1.

Thus the U.S. Supreme Court has made it clear that the 90 day period in this case expired on March 8, 1978, 90 days from the date of the order denying rehearing.

The respondent Marquette, by obtaining the stay, was granted rather extraordinary relief. It was enabled thereby to keep out of the Minnesota market a competing credit card which offered a clear cost advantage to Minnesotans even though this Court had ruled that the injunction should not have been granted in the first instance. The Marquette has had an extra three months free of this competition and has made no effort to comply with conditions of the stay. The Marquette can, under the circumstances, be fairly asked to strictly comply with the terms of the stay or lose its benefits.

We believe it appropriate, in addition, to point out another irony created by the stay order. The First of Omaha Service Corporation, and the First National Bank of Omaha, have been effectively enjoined from operating in Minnesota as they wish to do. Yet some other national bank located in another state would have the absolute right to market its credit card in Minnesota using the more competitive rate structure allowed in several surrounding states including Nebraska. Those banks could do so because of this Court's ruling in this case, yet the prevailing appellant, and its parent bank, are legally enjoined and may have to suffer the frustration of observing

other banks freely operating in Minnesota under the protection of this Court's decision. The bank credit card business is highly competitive, and this appellant and its parent cannot fairly be enjoined while others may come into this market without fear.

The failure of the Marquette to seek certiorari within the required time and the increasing unfairness of continuing to restrain the appellant compel, we submit, that the order granting a stay of judgment be vacated and that the mandate to the district court be issued accordingly.

Dated: March 10, 1978.

Date of Submission: March 18, 1978.

MACKALL, CROUNSE
& MOORE
By Clay R. Moore
1000 First National
Bank Building
Minneapolis, Minnesota 55402
Telephone: (612) 333-1341
Attorneys for Appellant First
of Omaha Service
Corporation

STATE OF MINNESOTA
IN SUPREME COURT

NO. 47561

THE MARQUETTE NATIONAL
BANK OF MINNEAPOLIS,

Respondent,

vs.

FIRST OF OMAHA SERVICE CORPORATION,

Appellant,

and

STATE OF MINNESOTA,

Intervenor
Respondent.

ORDER

Based upon all the files, records and proceedings herein, IT IS HEREBY ORDERED that appellant's motion to vacate the stay of judgment of the order of this court dated December 8, 1977, be, and the same is, hereby denied.

Dated: 4-10-78.

By the Court:
ROBERT J. SHERAN
Chief Justice